SELECTED GUIDELINE APPLICATION DECISIONS FOR THE THIRD CIRCUIT

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Part B General Application Principles

§1B1.1 Application Instructions

United States v. Diaz, 245 F.3d 294 (3d Cir. 2001). The district court erred in retroactively applying an amendment to §§1B1.1 and 1B1.2 which overturned case law that permitted courts to use multiple count cases to select a guideline based on factors other than conduct charged in the offense of conviction which carries the highest offense level. Although the Commission had characterized the amendment as "clarifying," its characterization was not binding on the court, nor was it entitled to substantial weight. The Third Circuit found the amendment effected a substantive change in the law and could not be retroactively applied.

§1B1.2 Applicable Guidelines

See United States v. Boggi, 74 F.3d 470 (3d Cir.), *cert. denied*, 519 U.S. 823 (1996), §2B3.2, p. 4.

United States v. Conley, 92 F.3d 157 (3d Cir. 1996), *cert. denied*, 520 U.S. 1115 (1997). The district court's determination of the objectives of the defendant's conspiracy did not violate the defendant's Sixth Amendment right to a jury, nor impinge upon his due process rights. The jury convicted the defendant of a single count of conspiracy under 18 U.S.C. § 371. The defendant asserted that because the jury did not specify the object of the conspiracy for which it convicted him, it was unconstitutional to sentence him under the money laundering guideline because those provisions were more severe than the gambling guidelines. The appellate court held that because the maximum sentence for general conspiracy did not depend upon the penalties authorized for the underlying substantive offenses, the defendant's statutory maximum sentence on the count, as distinguished from the maximum sentence under the guidelines, did not depend upon whether the jury found the defendant guilty of either or both objects of the conspiracy. Furthermore, the court relied on the decision in McMillan v. Pennsylvania, 477 U.S. 79 (1986), in holding that the Sixth Amendment did not guarantee a right to jury sentencing, even where the sentence turned on specific findings of fact. The court maintained that because the guidelines did not alter the maximum sentence for the offense for which the defendant was convicted, but merely limited the sentencing court's discretion in selecting a penalty within the permissible range, there was no constitutional violation in permitting the district court to consider relevant conduct for which the defendant was neither charged nor convicted. In conclusion, the court noted that by determining the objects of the conspiracy beyond a reasonable doubt, the sentencing court met whatever procedural standard might have been required.

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

Watterson v. United States, 219 F.3d 232 (3d Cir. 2000). The district court erred when it considered relevant conduct in determining that the applicable guideline was §2D1.2, instead of §2D1.1, for a defendant who pled guilty to conspiracy to distribute cocaine and marijuana, but who did not stipulate to and was not convicted of distribution in or near schools. Although the conspiracy operated within 1,000 feet of a school zone, the defendant was not charged with or was convicted of conspiracy to distribute controlled substances in or near a school zone. The Court found the district court erred in considering relevant conduct in determining which offense guideline section should be applied. According to §1B1.1(a), the district court should first select the applicable guideline section to the offense of conviction, and should only then apply relevant conduct factors.

§1B1.4 Information to be Used in Imposing Sentence

United States v. Baird, 109 F.3d 856 (3d Cir.), *cert. denied*, 118 S. Ct. 243 (1997). The district court did not err in departing upward and in considering in connection with the upward departure the conduct underlying counts dismissed as part of a plea agreement. The defendant contended that such consideration was improper. The appellate court disagreed, and held that the guidelines offer sentencing courts considerable leeway as to the information they may consider when deciding whether to depart from the guideline range. Section 1B1.4 specifically states that in determining whether a departure is warranted, "the court may consider, without limitation, any information concerning the background, character and conduct of the defendant . . . ." Moreover, with respect to conduct underlying dismissed counts, commentary to §1B1.4, when read in conjunction with the commentary to §1B1.3, indicates that considering such conduct is appropriate. It must be, therefore, that conduct not formally charged or not an element of the offense can be considered at sentencing. If such information can be considered in determining the applicable guideline range under §1B1.3, then such information can be considered in determining whether to depart from that sentencing range under §1B1.4. In addition, the Supreme Court recently held that a sentencing court is permitted to consider conduct of which a jury acquitted a defendant. United States v. Watts, 519 U.S. 148 (1997).

§1B1.8 Use of Certain Information

United States v. Baird, 218 F.3d 221 (3d Cir. 2000). The district court erred in considering self-incriminating material in calculating the defendant's sentence when the government had agreed that the information would not be used against him if he pled guilty. The defendant, a former police officer, pled guilty to a Hobbs Act robbery, conspiracy to violate civil rights, and obstruction of justice. The defendant and the government agreed that information furnished by him would be admitted against him “if [he] failed to plead guilty.” Although he fabricated evidence to exculpate a co-conspirator, he later aided the government in obtaining incriminating evidence against him and also pled guilty to obstruction of justice. The district court concluded the defendant’s attempts to shield the co-conspirator caused the agreement to “self destruct,” and therefore, §1B1.8 was never triggered. The district court departed upward because of the defendant’s “extraordinary disruption” of the system. The Third Circuit found that Application Note 12 states self-incriminating information “shall not be used to increase the defendant’s sentence above the applicable guideline range” if there is an agreement pursuant to §1B1.8. The Court disagreed with the district court and found an agreement existed that

incriminating information would not be used against the defendant, even in his sentencing, if he pled guilty. The Court further found although the defendant did breach the agreement by providing inaccurate information, it was cured when the government accepted a guilty plea for obstruction of justice. The Court reversed and remanded for resentencing.

§1B1.11 Use of Guideline Manual in Effect at Sentencing

United States v. Corrado, 53 F.3d 620 (3d Cir. 1995). The district court did not err in sentencing the defendant pursuant to the entire guideline manual in effect at the time he committed his offense without reference to the additional 1-level reduction for acceptance of responsibility available in the manual in effect at the time of sentencing. The Third Circuit held that in adopting §1B1.11(b)(2), the Commission "effectively overruled" United States v. Seligsohn, 981 F.2d 1418 (3d Cir. 1992), and United States v. Kopp, 951 F.2d 521 (3d Cir. 1991), insofar as those opinions conflict with the codification of the one-book rule.

United States v. Griswold, 57 F.3d 291 (3d Cir.), *cert. denied*, 516 U.S. 969 (1995). The district court did not err by using the "one book rule" of §1B1.11(b)(2) to sentence the defendant. The circuit court held that §1B1.11(b)(2) was binding on the court, and that the district court was correct to refuse to mix and match provisions from different versions of the guidelines. The defendant argued that the district court violated the mandate of §1B1.11(a) which requires application of the guidelines in effect on the date that the defendant is sentenced (1993 version). However, because the use of the amended version of §2K2.1 would violate the ex post facto clause, the district court, under §1B1.11(b)(2), applied the guidelines in effect at the time the offense was committed (1990 version). The Third Circuit, in affirming the district court's application of the "one book rule," held that this case was directly on point with the holding in United States v. Corrado, 53 F.3d 620 (3d. Cir. 1995). In Corrado, the Third Circuit joined the majority of the courts of appeals in holding that district courts may not mix and match provisions from different versions of the guidelines in order to tailor a more favorable sentence.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A3.1 Criminal Sexual Abuse: Attempt to Commit Criminal Sexual Abuse

United States v. Queensborough, 227 F.3d 149 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 894 (2001). The district court did not err in finding that the Presentence Report (PSR) provided the defendant with the required notice of an upward departure pursuant to §5K2.8 and Application Note 5 of §2A3.1 [now Application Note 6]. The defendant and codefendant accosted a man and a woman, raped and assaulted the woman, assaulted the man, and forced the two victims to have sex as they watched. The defendant pled guilty to aggravated rape and carrying a firearm in relation to a crime of violence. For the aggravated rape, the district court granted an upward departure from a range of 121 to 151 months to 20 years. The defendant objected, claiming although he had been given notice of a possibility of an upward departure, he had not been given notice there would actually be an upward departure in his sentence. The district court found the language in the PSR,

located underneath the heading “Factors that May Warrant Departure” which stated, “According to U.S.S.G. §2A3.1, Application Note 5, ‘If a victim was sexually abused by more than one participant, an upward departure may be warranted, *see* §5K2.8 (Extreme Conduct),’” gave the defendant the requisite notice.

Part B Offenses Involving Property

§2B3.1 Robbery

United States v. Figueroa, 105 F.3d 874 (3d Cir.), *cert. denied*, 117 S. Ct. 1860 (1997). In considering this issue of first impression, the Third Circuit joined with the majority of the circuits in holding that a defendant's sentence may be enhanced 2 levels under §1B3.1(b)(2)(F) for making an express threat of death, "without explicitly threatening to kill the victim." United States v. Robinson, 86 F.3d 1197 (D.C. Cir. 1996); United States v. Murray, 65 F.3d 1161 (4th Cir. 1995), *cert. denied*, 1999 WL 699933 (1999); United States v. Hunn, 24 F.3d 994 (7th Cir. 1994); United States v. France, 57 F.3d 865 (9th Cir. 1995) (defendant's statement that he had dynamite qualified as express threat of death). *But see* United States v. Alexander, 88 F.3d 427 (6th Cir. 1996) (holding that to satisfy the "express" requirement a defendant's statement must distinctly and directly indicate that the defendant intends to kill or cause the death of the victim). In the case at bar, the defendant robbed a bank and presented a written statement to the bank teller that he possessed a gun. The circuit court upheld the sentencing court's determination that such a statement qualified as an express threat of death for which a 2-level enhancement was warranted. In reaching this conclusion, the circuit court deemed the crucial determination to be whether a reasonable victim would fear for his or her life due to the defendant's statements or actions. "[C]ommon sense dictates that the inference to be drawn from a statement that a robber possesses a gun is that he is willing to it." Were the court to hold otherwise, similarly situated defendants could receive disparate sentences by choosing to articulate their threats with fewer words. "[I]t is the effect of the threat, not its actual wording, which triggers the 2-level enhancement under section 2B3.1(b)(2)(F)."

§2B3.2 Extortion by Force or Threat of Injury or Serious Damage

United States v. Boggi, 74 F.3d 470 (3d Cir.), *cert. denied*, 519 U.S. 823 (1996). Upon the Government's appeal, the appellate court remanded the case for the district court to resentence the defendant using guideline §2B3.2 instead of §2C1.1. The appellate court agreed that the district court erred in applying §2C1.1 to determine the base offense level of the extortion counts. The district court applied §2C1.1 to these offenses over the government's objection that §2B3.2 should ordinarily be applied to a threat to cause labor problems. In agreeing with the government's position, the appellate court noted that section 2B3.2's commentary states that the guideline applies to situations in which the "threat . . . to injure a person or physically damage property, or any comparably serious threat" may be inferred from the circumstances or the reputation of the person making the threat. Section 2C1.1 is inapplicable because it applies to public officials, and the Sentencing Commission did not intend to characterize union officials as public officials. Based upon these distinctions, the appellate court found that it was error for the district court to apply §2C1.1. In remanding for resentencing, the appellate court instructed the district court to "make the necessary factual findings to determine" the type of harm involved in

this case. Application of §2B3.2 requires either a physical threat or an economic threat so severe as to threaten the existence of the victim. If the district court finds that the threat in this case did not rise to the level required under §2B3.2, application of §2B3.3 is appropriate.

§2B4.1 Bribery in Procurement of Bank Loan and Other Commercial Bribery

United States v. Cohen, 171 F.3d 796 (3d Cir.1999). The district court erred in interpreting "improper benefit conferred," which refers to the "net value accruing to the entity on whose behalf the individual paid the bribe," rather than the value received by the defendant. The defendant was convicted of 25 counts of mail fraud for kickbacks he paid to meat managers to induce them to buy their meat from the company where defendant was a meat salesman. The defendant paid $111,548.21 in kickbacks, and received $500 cash per week from his employer. The district court used the dollar amount of the kickbacks instead of the net value the company gained as a result of the kickbacks. Under §2B4.1, comment.(n. 2), the "improper benefit" is "the value of the action to be taken or effected in return for the bribe." The government presented evidence that the defendant's kickbacks induced a grocery store to buy $10,000,000 worth of meat, which gave the meat company a profit of $700,000. If the government proves by a preponderance of evidence that $700,000 was the resulting profit, that figure should be used to as the "improper benefit" to determine the defendant's offense level under §2B4.1(b)(1).

Part C Offenses Involving Public Officials

§2C1.1 Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right

See United States v. Boggi, 74 F.3d 470 (3d Cir.), *cert. denied,* 519 U.S. 823 (1996), §2B3.2, p. 4.

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

United States v. Alton, 60 F.3d 1065 (3d Cir.), *cert. denied,* 516 U.S. 1015 (1995). The district court erred in departing downwards from the applicable guideline sentencing range on the basis that the Sentencing Commission did not adequately consider as a mitigating factor the disparate impact that its policies would have on African-American males when it developed the guideline ranges for crack cocaine convictions. The defendant was convicted for conspiracy to possess and distribute cocaine and cocaine base and possession with intent to distribute in excess of five grams of cocaine base and sentenced to a ten-year term of imprisonment followed by a five-year term of supervised release, a downward departure from the guideline range of 168 to 120 months. On appeal, the government challenged the downward departure as arbitrary and capricious. The circuit court ruled that the Commission's reliance on the federal drug statutes, 21 U.S.C. §§ 841(b)(1) and 846 as the primary basis for the guideline sentences meets the test set forth by the Supreme Court in Motor Vehicle Manufacturers Ass'n v. State Farm Automobile Ins. Co., 463 U.S. 29, 43 (1983), wherein the Supreme Court held that an agency adopting a rule

pursuant to the informal rulemaking procedures "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id*. at 43. The circuit court noted that it had explicitly rejected an equal protection challenge to the relevant statutory and guideline procedures. *See* United States v. Frazier, 981 F.2d 92 (3d Cir. 1992), *cert. denied*, 507 U.S. 1010 (1993). The circuit court also recognized, in response to the government's challenge to the district court's downward departure under §5K2.0, that every circuit court considering the matter has held that the impact of the guideline treatment of crack cocaine is not a proper ground for downward departure. The circuit court held that the defendant failed to establish facts or circumstances peculiar to himself for his offense that justify a downward departure based on the disparate impact of the severe penalties for crack cocaine offenses for African-Americans is not a valid ground for departure from the guideline ranges for crack cocaine offenses.

United States v. Goggins, 99 F.3d 116 (3d Cir. 1996), *cert. denied*, 520 U.S. 1161 (1997). The district court did not err when it imposed a 2-level enhancement under §2D1.1(b)(1) for possession of a firearm, although the defendant's 18 U.S.C. § 924(c) conviction for use of a firearm was vacated in light of Bailey v. United States, 516 U.S. 137 (1995). The defendant had been convicted of possession with intent to distribute cocaine base (21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)), and of using and carrying a firearm during a drug offense (18 U.S.C. § 924(c)). The district court vacated the defendant's section 924(c) conviction, but imposed the 2-level increase under §2D1.1, concluding that the weapon clearly was present in the bedroom when the police arrested the defendant. The defendant argued that his acquittal on the 18 U.S.C. § 924(c) count should bar the §2D1.1 enhancement. The Third Circuit, joining with the First, Fourth, Sixth, Seventh, and Tenth Circuits, held that "a weapons enhancement under §2D1.1(b)(1) is permissible after an acquittal under section 924(c)(1)." *See* United States v. Ovalle-Marquez, 36 F.3d 212 (1st Cir. 1994), *cert. denied*, 513 U. S 1132 (1995); United States v. Romulus, 949 F.2d 713 (4th Cir. 1991), *cert. denied*, 503 U.S. 992 (1992); United States v. Barnes, 49 F.3d 1144 (6th Cir. 1995); United States v. Pollard, 72 F.3d 66 (7th Cir. 1995); United States v. Coleman, 947 F.2d 1424 (10th Cir. 1991), *cert. denied*, 503 U.S. 972 (1992). The Third Circuit followed the reasoning of Pollard, 72 F.3d at 68, which stated that guideline section 2D1.1(b)(1) is broader than 18 U.S.C. § 924(c)(1) and encompasses conduct not within section 924(c)(1). Furthermore, the court noted that the standard of proof for the guideline enhancement is less than the burden for a conviction under the statute. The circuit court concluded that the weapon was present in the bedroom when the police arrested the defendant, and it was not improbable that the weapon was connected with the offense, and thus the guideline enhancement was properly applied. *See* §2D1.1, comment. (n.3).

See Watterson v. United States, 219 F.3d 232 (3d Cir. 2000), §1B1.3, p. 2.

United States v. Yeung, 241 F.3d 321 (3d Cir. 2001). The district court erred in finding the proper amount of drugs attributable to the defendant was the larger amount which his co-conspirator had negotiated to sell instead of the one ounce of heroin that was actually delivered. The defendant met with an informant who had been instructed by a DEA agent to see if he could buy an ounce of heroin, but the defendant refused to sell only an ounce. After many discussions in which other amounts were discussed, the defendant agreed to sell a single ounce. The district court found the other discussions amounted to an agreement for a larger sale and sentenced the

defendant based on that larger amount. The Third Circuit found that an amendment to §2D1.1 at Application Note 12 specified the actual weight delivered rather than the weight under negotiation should be the amount used for calculating a sentence and for sentencing purposes; if a defendant is to be sentenced for a larger quantity than actually delivered, the quantity must have been agreed upon prior to delivery.

Part F Offenses Involving Fraud or Deceit

§2F1.1 Fraud and Deceit

United States v. Coyle, 63 F.3d 1239 (3d Cir. 1995). The district court did not err in determining the amount of loss by adopting the "amount taken" or "gross gain" as the measure of fraud loss. The defendant was convicted of three counts of mail fraud and appealed the court's legal interpretation of fraud loss. The circuit court stated that under §2F1.1, fraud loss is the "amount of money the victim has actually lost revised upward to the intended or probable loss if either amount is higher and determinable." United States v. Kopp, 951 F.2d 521, 523 (3d Cir. 1991). However, the court stated that under the guidelines and case law precedent, the offender's gain from committing the fraud is an alternative estimate to use in cases of embezzlement. United States v. Badaracco, 954 F.2d 928, 936 (3d Cir. 1992). The circuit court concluded that it was "appropriate for the district court to adopt `amount taken' or gross gain as the measure of fraud loss, *i.e.*, the difference between the amount reported and the amount retained." The circuit court rejected the defendant's contention that the amount of fraud loss should be reduced by the amount of administrative retention attributable to the contract.

United States v. Diaz, 245 F.3d 294 (3d Cir. 2001). The district court erred when it sentenced the defendant under the money laundering guideline instead of the fraud guideline. The defendant who, along with her brother, owned a cosmetology school, pled guilty to fraud and money laundering. She engaged in a scheme to manipulate the federally funded student loan program by submitting false deferment and forbearance forms to lenders to show an inaccurate default rate because a high default rate would cause the federal funding to discontinue. She was sentenced under the money laundering guideline because the court retroactively applied an amendment to the guidelines which mandated the courts to use the one guideline specifically stated in the guideline manual. The Third Circuit found this was a substantive amendment for which retroactive application would raise *ex post facto* concerns and therefore could not be used. Because the amendment was not retroactive, the Court relied on previous case law, United States v. Smith, 186 F.3d 290 (3d Cir. 1999), and found that the defendant's overall conduct was not in the heartland of the money laundering guideline, and that application of the money laundering guideline would "obscure[] the overarching directive to match the guideline to the offense conduct which formed the basis of the underlying conviction."

United States v. Duliga, 204 F.3d 97 (3d Cir.), *cert. denied*, 530 U.S. 1222 (2000). The district court did not err in attributing the entire fraud loss caused by a telemarketing scam to the defendant, even though his efforts were responsible for only a portion of the total loss. The defendant worked as a telemarketer for a company that scammed victims out of nearly $200 each for a total loss to the victims of $1.2 million dollars. He was convicted by a jury of mail and wire fraud and conspiracy to commit mail and wire fraud, and contended that the district court

incorrectly determined his base offense level by attributing to him the entire amount of loss generated by the conspiracy rather than the loss he personally generated. However, the Third Circuit found where the crime of fraud involves a jointly undertaken criminal activity, the court may attribute to the defendant amounts of loss resulting from the "reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity" as long as the loss resulting from the acts of others are in furtherance of the jointly undertaken activity, are within the scope of the defendant's agreement, and are reasonably foreseeable in connection with the criminal activity.

United States v. Geevers, 226 F.3d 186 (3d Cir. 2000). The district court did not err in finding the face amount of the fraudulent checks deposited by the defendant could be considered in determining the amount of intended loss. The defendant pled guilty to bank fraud arising out of a check-kiting scheme, and argued because a passer of worthless checks could not possibly escape with the full face amount of the worthless deposits, the district court erred in calculating his intended loss. The Third Circuit stated while the defendant might not have reasonably believed he would be able to extract the full face value of the fraudulent checks, it would not automatically follow that he did not intend to extract every penny possible. Because the Commentary explains a district court is to consider intended loss in determining the loss figure and it further states losses do not need not be determined with precision, a district court is not barred from considering the full amount of the checks to be the intended loss. The Court noted other courts of appeals are divided on this matter. Finally, the defendant argued he could not be held accountable for money that would have been impossible to take. The Court joined with the majority of circuits in holding impossibility is not in and of itself a limit on the amount of intended loss for purposes of calculating sentences. United States v. Klisser, 190 F.3d 34, 36 (2d Cir. 1999) (per curiam); United States v. Blitz, 151 F.3d 1002, 1010 (9th Cir. 1998); United States v. Wai-Keung, 115 F.3d 874, 877 (11th Cir. 1997); United States v. Studevent, 116 F.3d 1559, 1563 (D.C. Cir. 1997).

United States v. Greene, 212 F.3d 758 (3d Cir. 2000). The district court did not err in finding a sentencing enhancement under §2F1.1 was applicable for an offense affecting a financial institution in which a defendant derives more than $1 million in gross receipts, even though he did not derive more than $1 million from any one affected institution. The defendant, who ran a large scale criminal ring that passed stolen and counterfeit checks, and was responsible for defrauding banks and other financial institutions out of more than $6 million, pled guilty to violating the RICO and RICO conspiracy Acts. Agreeing with other circuit courts, the Third Circuit found §2F1.1(b) does not require a defendant derive more than $1 million from a single financial institution. "The requirement that a financial institution be affected and the requirement that the defendant derive more than $1 million in gross receipts from the offense are separate and distinct prerequisites." *See* United States v. Kohli, 110 F.3d 1475 (9th Cir. 1997).

United States v. Hayes, 242 F.3d 114 (3d Cir. 2001). The district court erred in not attempting to determine whether any portion of defendant's service had value before determining the amount of loss under the fraud provision. The defendant pled guilty to wire fraud after forging her qualifications for employment. Her charged conduct involved causing the employer to deposit her salary into her bank account. The Third Circuit held that the district court should have attempted to determine whether any of the services she performed had any value so as to offset the amount of loss attributable to her for sentencing purposes. Even though the defendant lacked the

minimum educational requirements, she received a number of high performance ratings, and was granted a promotion. The Court found "when something of value is provided in return for the loss, the 'loss' valuation is equal to the difference between what was provided and what was taken."

United States v. Maurello, 76 F.3d 1304 (3d Cir. 1996). The district court erred in holding that "loss," for §2F1.1 purposes, included money paid by clients for satisfactory legal services despite their performance by an unlicensed attorney. The district court rejected the approach advocated by the PSR, whereby the probation office sent letters to all clients of the defendant inquiring whether they were satisfied with the defendant's services and used the 27 dissatisfied clients to calculate "loss." Instead, the district court accepted the government's argument that "loss" should be the gross total of all fees collected by the defendant because none of the clients received the services of a licensed attorney for which they paid. The circuit court rejected the district court's reasoning and concluded that in the case of a fraud, which is not based on the straightforward taking of property and for which the "amount taken" will overstate the loss, "actual harm" should be the basis of the loss calculation. Basing the defendant's sentence on the "amount taken" would undermine the goal of the sentencing guidelines which is to treat "similarly situated" defendants similarly. The circuit court rejected the notion that an unlicensed attorney who represented his clients competently and provided them with a benefit should be treated the same as a defendant who represented his clients incompetently to their detriment. Once the court decided to use "actual harm" as the measure of loss, it sought to make a reasonable calculation of this amount. The circuit court remanded to the district court for a determination of whether the 27 dissatisfied client complaints were legitimate and of whether the amounts contained in the 27 complaints are a reasonable calculation of "actual loss."

United States v. Stephens, 198 F.3d 389 (3d Cir. 1999). The district court did not err in considering the relevant conduct of actions outside the statute of limitations in determining the base offense level for defendant's fraud conviction. The defendant pled guilty to Social Security fraud after collecting her father's social security checks for over 21 years after he died. At her sentencing hearing, she objected to the inclusion of the checks cashed outside the statute of limitations period as relevant conduct in determining her sentence. Agreeing with six other courts of appeal, the Court found conduct that is not chargeable may be considered in determining the appropriate sentence under the guidelines. *See* United States v. Silkowski, 32 F.3d 682, 688 (2d Cir. 1994); United States v. Pierce, 17 F.3d 146, 150 (6th Cir. 1994); United States v. Matthews, 116 F.3d 305, 307 (7th Cir. 1997); United States v. Behr, 93 F.3d 764, 765-66 (11th Cir. 1996).

United States v. Torres, 209 F.3d 308 (3d Cir.), *cert. denied*, 531 U.S. 864 (2000). The district court did not err when it found the amount of loss for sentencing purposes was the entire amount the defendant fraudulently deposited in the bank account, and not the amount he attempted to withdraw. The defendant opened a money market account in a false company name and deposited a total of $66,262.59 into the account using a stolen U.S. Treasury check and a third party check. He attempted to withdraw $24,900 but was not successful because the bank suspected the account was fraudulent. The Third Circuit found the Commentary to §2F1.1 states the guideline not only covers actual loss but also intended loss, if that loss can be determined and is higher than actual loss. Agreeing with the Seventh Circuit, the Court found the proper amount for sentencing purposes was the full amount of the loss he was prepared to inflict. *See* United States v. Strozier, 981 F.2d 281, 285 (7th Cir. 1992).

Part G Offenses Involving Prostitution, Sexual Exploitation or Minors, and Obscenity

§2G2.1 Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Prostitution

United States v. Galo, 239 F.3d 572 (3d Cir. 2001). The district court erred in enhancing the defendant's sentence based upon his prior state court convictions. The defendant pled guilty to production of material depicting the sexual exploitation of children and possession of material depicting the sexual exploitation of a minor. The district court rejected his argument that he was not subject to the mandatory minimum sentence found in 18 U.S.C. § 2251(d) because his prior state convictions did not relate to the sexual exploitation of children as required by the statute, and therefore sentenced him to 15 years' imprisonment. The defendant had previously pled guilty in state court to corruption of minors, endangering the welfare of children, and indecent assault. The Third Circuit found because the state crimes for which he pled guilty did not specifically refer to the sexual exploitation of children, the district court could not impose an enhancement based on conduct that resulted in a conviction for those crimes. It is the elements of a given state statute, not the conduct that violates it, which determines if the statute relates to the sexual exploitation of children, and the statutory elements in the state statute were aimed at conduct of *any* nature that tends to corrupt children, not just sexual conduct. Therefore, the Court vacated the sentence.

§2G2.2 Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic

United States v. Crandon, 173 F.3d 122 (3d Cir. 1999). The district court erred in applying the cross-reference in §2G2.2(c)(1) without considering whether the defendant's purpose for taking a sexually explicit photograph was to create pornographic pictures. The government argued that the defendant's intent is irrelevant, even though such a view results in a form of strict liability. The defendant argued that his purpose in taking the pictures was "the memorialization of his love for the girl, which had progressed to sexual intimacy, rather than the photographing of sexually explicit conduct." The record showed that the defendant took approximately 48 pictures of the girl—two of which were sexual in nature. A court must consider the defendant's state of mind in determining whether to apply the cross-reference in §2G2.2(c)(1) "to ensure that the defendant acted 'for the purpose of producing a visual depiction of [sexually explicit] conduct.'"

Part J Offenses Involving the Administration of Justice

§2J1.2 Obstruction of Justice

United States v. Serafini, 233 F.3d 758 (3d Cir. 2000). The district court did not err in enhancing the defendant's sentence for his substantial interference with the administration of justice. The defendant, a state legislator, was convicted of perjury before a grand jury, and he appealed his sentence, claiming the district court had no basis for a three-level enhancement under §2J1.3 (now redesignated as §2J1.2). The district court found that the defendant's perjured

testimony caused an unnecessary expenditure of substantial governmental resources, including the re-interview of four witnesses, re-calling two witnesses before the grand jury, and issuing subpoenas. The Third Circuit agreed the enhancement was warranted, and the district court's reasoning was sufficient to hold there was substantial governmental expense due to the defendant's perjury.

§2J1.7 Commission of Offense While on Release

United States v. Hecht, 212 F.3d 847 (3d Cir.), *cert. denied*, 530 U.S. 1249 (2000). The district court did not err in enhancing the defendant's sentence for committing a crime while he was on pretrial release. The defendant pled guilty to criminal conspiracy to commit wire fraud and mail fraud and began serving his sentence in 1994. Earlier, in the 1980s, he ran a fraudulent scheme. He also ran a second fraudulent scheme from 1993 to 1995, and in 1998 pled guilty to criminal conspiracy to commit wire fraud and mail fraud for his involvement in that scheme. At sentencing, the district court applied a three-level enhancement because he had committed this offense while on pretrial release for the first scheme committed during the early 1980s. The defendant contended the enhancement could not be applied because he was not given notice at the beginning of his pretrial release in the first case that the commission of a new offense during his release would subject him to an enhanced sentence in the second case. The Third Circuit found that §2J1.7, comment. (backg'd), which states an enhancement "may be imposed only after sufficient notice to the defendant by the government or the court," mandates simply presenting notice in the second case, not a prerelease notice in the first case.

Part K Offenses Involving Public Safety

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

United States v. Loney, 219 F.3d 281 (3d Cir. 2000). The district court did not err in applying a four-level enhancement under §2K2.1 to the defendant's sentence when the defendant had admitted he possessed heroin for purposes of sale, and possessed or used a pistol "in connection with" that felony drug offense. The defendant was convicted of felony drug trafficking, and the district court applied the enhancement based on the defendant's possession of a semi-automatic pistol at the time of his arrest. He maintained he had the gun for personal protection and the government had no evidence tying the gun to his drug trafficking. However, the district court found he felt he needed a gun due to his drug dealing. The Third Circuit found the phrase "in connection with" should be interpreted expansively, even though the defendant urged the Court to adopt a test requiring proof of "some causal nexus" between the gun and the drug felony. Agreeing with its sister circuits, the Third Circuit stated that §2K2.1 required some relationship between the gun and the felony. It further held that when a defendant has a loaded gun on his person while caught in the middle of a crime that involves drug transactions, a district judge can reasonably infer there is a relationship between the gun and the offense. *See* United States v. Thompson, 32 F.3d 1 (1st Cir.1994); United States v. Nale, 101 F.3d 1000, 1003-04 (4th Cir.1996); United States v. Spurgeon, 117 F.3d 641, 643-44 (2d Cir. 1997); United States v. Wyatt, 102 F.3d 241, 247 (7th Cir. 1996), *cert. denied*, 520 U.S. 1149 (1997); United States v. Routon, 25 F.3d 815, 819 (9th Cir. 1994).

United States v. Miller, 224 F.3d 247 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 1144 (2001). The district court did not err in finding a sentence reduction based on lawful sporting purpose or collection did not apply because the defendant engaged in "unlawful use" when he illegally sold the firearms. The defendant pled guilty to selling firearms without a license. The district court rejected his argument that he possessed the guns for a lawful sporting purpose, finding that when he had sold the firearms, he engaged in "unlawful use" and was therefore barred from receiving the sporting purposes reduction. The Third Circuit agreed, but found the reduction was not applicable because when he sold the firearms, he did not possess them "solely for a lawful sporting purpose or collection." Further, the defendant argued the Commission intended the word "possessed" to refer to his use of the firearm only up to the date of the conduct giving rise to his conviction. Agreeing with other circuits, the Court held by authorizing the courts to inquire into the "actual use" to which the defendant put the firearms, the Commission showed its intent to extend the relevant inquiry to the conduct giving rise to the conviction. *See* United States v. Gresso, 24 F.3d 879, 881 (7th Cir. 1994).

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.2 Unlawfully Entering or Remaining in the United States

United States v. Graham, 169 F.3d 787 (3d Cir. 1999). The district court did not err in finding that the defendant's petit larceny, a class A misdemeanor under New York law, with a maximum sentence of one year, qualified as an aggravated felony. Under 8 U.S.C. § 1101(a)(43)(G), an aggravated felony includes "a theft offense . . . for which the term of imprisonment at least one year." Even without the verb required in this sentence, the prior version of the statute indicates that Congress intended to refer to the sentence imposed rather than the statutory minimum. The defendant received a one-year sentence, thus, even though classified as a misdemeanor, the offense qualifies as an "aggravated felony" for purposes of §2L1.2(b)(1)(B).

United States v. McKenzie, 193 F.3d 740 (3d Cir. 1999). The district court properly refused to depart downward pursuant to §2L1.2, note 5. The defendant pled guilty to knowingly and willfully re-entering the United States after being deported subsequent to his conviction for commission of an aggravated felony, in violation of 8 U.S.C. § 1326(a) and (b)(2), and was sentenced to 41 months' imprisonment. Prior to his deportation, the defendant was convicted of felony possession with intent to distribute cocaine base and was sentenced to three years of imprisonment, but two years and three months of the sentence were suspended. The defendant contends that the district court should have departed downward based upon Application Note 5 to §2L1.2 because he had previously been convicted of only one felony offense, which was not a crime of violence or firearms offense, and the term of imprisonment imposed for the prior felony did not exceed one year. Specifically, he contended that the phrase "sentence of conviction" should be defined by §4A1.2(b). The Third Circuit rejected this argument because §4A1.2(b) defines the phrase "sentence of conviction" for purposes of computing a defendant's criminal history category—not for purposes of §2L1.2. Rather, the applicable provision is 8 U.S.C. § 1101(a)(48)(B), which provides that a "term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part."

Part S Money Laundering and Monetary Transaction Reporting

§2S1.1 Laundering of Monetary Instruments

United States v. Bockius, 228 F.3d 305 (3d Cir. 2000). The district court erred in declining to apply the money laundering guideline on the ground that the defendant's misconduct was not connected with extensive drug trafficking or another serious crime, and further failed to consider whether the guideline should be applied on an alternative basis. The defendant, a former president of an insurance brokerage firm, pled guilty to wire fraud, foreign transportation of stolen funds, money laundering, and forfeiture, after stealing $600,000 from the firm, wiring it to various places, and fleeing to the Cayman Islands. The district court sentenced him under the fraud guideline, not the money laundering guideline, because it believed the heartland of cases under §2S1.1 includes only money laundering associated with extensive drug trafficking and serious crimes. The government appealed. Agreeing with other circuit courts, the Court found the district court's conclusion was incorrect, and held §2S1.1 is also intended to apply in typical money laundering cases in which the defendant knowingly conducted a financial transaction to conceal tainted funds or funnel them into additional criminal conduct. *See* United States v. Hemmingson, 157 F.3d 347, 363 (5th Cir. 1998); United States v. Prince, 214 F.3d 740, 768 (6th Cir. 2000); United States v. Ross, 210 F.3d 916, 928 (8th Cir. 2000).

§2S1.2 Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity

United States v. Cefaratti, 221 F.3d 502 (3d Cir. 2000). The district court did not err in applying the money laundering guideline rather than the fraud guideline to the defendant's sentence. The defendant, an owner and president of a cosmetology school, pled guilty to engaging in monetary transactions in proceeds of specified unlawful activity, mail fraud, student loan fraud, and destruction of property to prevent seizure. He engaged in a scheme to manipulate the federally funded student loan program by submitting false deferment and forbearance forms to lenders to show an inaccurate default rate because a high default rate would cause the federal funding to discontinue. Citing to the guideline introduction to the appendix, he argued his case was an atypical one "in which the guideline section indicated for the statute of conviction is inappropriate," and that his conduct as a whole was little more than routine fraud to which money laundering was incidental. However, the Third Circuit found it clear the defendant used the proceeds of his mail fraud to promote further acts of fraud, and therefore concluded the district court did not err in sentencing him under the money laundering guideline.

Part X Other Offenses

§2X1.1 Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guidelines)

United States v. Geevers, 226 F.3d 186 (3d Cir. 2000). The district court did not err in refusing to apply a three-level reduction in the guideline calculation for a defendant who had not completed his attempt to withdraw money in a bank fraud scheme, even though the amount of loss used in calculating his guideline level was based on intended loss. The defendant maintained

because he did not complete the acts necessary to effect the intended loss, he was entitled to the reduction under the attempt guideline. The Court found no error in the district court's consideration that the defendant was only prevented from drawing on his worthless check because the bank closed his account after another bank notified it the check was not backed by sufficient funds. Therefore, the defendant was prevented from even attempting to draw on his worthless check, and it was not error for the court to consider that he would have completed his intended fraud but for the intervention of a third party.

United States v. Torres, 209 F.3d 308 (3d Cir), *cert. denied*, 531 U.S. 864 (2000). The district court did not err when it found the defendant did not qualify for a three-level reduction for an incomplete attempt. The defendant opened a money market account in a false company name and deposited a total of $66,262.59 into the account using a stolen U.S. Treasury check and a third party check. He attempted to withdraw $24,900 but was unsuccessful because the bank suspected the account was fraudulent, and he pled guilty to bank fraud. The defendant argued because his actions to defraud the bank were thwarted by the bank, he was eligible for a three-level reduction for an attempted offense. However, the Third Circuit stated he pled guilty to the substantive, completed offense and not to a mere attempt. Further, the Court found with respect to the $24,900 attempted withdrawal, the defendant had "completed all the acts [he] believed necessary," and with respect to the balance of the fraudulently deposited funds, he was "about to complete all such acts" and was unsuccessful only because the bank was fortunate enough to be suspect. Therefore, the district court did not err in rejecting his request for a reduction.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Vulnerable Victim

United States v. Cruz, 106 F.3d 1134 (3d Cir. 1997). The district court properly applied the vulnerable victim enhancement to the defendant's sentence pursuant to §3A1.1(b). The appellate court found that the enhancement was appropriate regardless of the fact that the victim was only a passenger in the carjacked vehicle and the crime was not committed with a view to her vulnerability. The defendant, relying on the Sixth Circuit minority position, argued that in order to apply the enhancement properly, the victim must be the actual victim of the offense of the conviction. The appellate court, relying on the majority of circuits, rejected this reasoning and held that the courts should not interpret §3A1.1(b) narrowly but, should look to the defendant's underlying conduct to determine whether the enhancement may be applicable.

§3A1.2 Official Victim

United States v. Walker, 202 F.3d 181 (3d Cir. 2000). The district court erred on the first remand in holding an official victim enhancement was warranted when a prison cook supervisor was attacked by the defendant. The defendant, a federal prisoner, pled guilty to possession of a prohibited object by a prison inmate and impeding a federal officer. On remand, the district court

applied a three-level enhancement under §3A1.2 stating the cook supervisor was a "corrections officer" for purposes of the enhancement. However, the Third Circuit found, based on the definition given the term by the first panel, that the record did not support a finding that a supervisor was a corrections officer. The Court reversed, finding the supervisor's general duties, which included correctional technique training when hired and the authority to arrest and detain prisoners, did not qualify because every employee received such training and had such authority. Also, his primary duties were to supervise and instruct inmate workers in food preparation, more akin to a manager in a restaurant, and this was not "guarding." Finally, the supervisor was not engaged in guarding the prisoners at the time of the assault, but was instead preparing food trays. Therefore, the district court erred as a matter of law in finding the supervisor was a corrections officer, and the official victim enhancement should not have been applied.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Cefaratti, 221 F.3d 502 (3d Cir. 2000). The district court did not err in applying an upward adjustment for the defendant's leadership role in the offense. The defendant, an owner and president of a cosmetology school, pled guilty to engaging in monetary transactions in proceeds of specified unlawful activity, mail fraud, student loan fraud, and destruction of property to prevent seizure. He engaged in a scheme to manipulate the federally funded student loan program by submitting false deferment and forbearance forms to lenders to show an inaccurate default rate because a high default rate would cause the federal funding to discontinue. The defendant disputed that he was a leader in the fraud and claimed even if he was a leader in the fraud, he was not a leader in the subsequent money laundering activities. However, the district court found, and the Third Circuit agreed, the defendant specifically admitted he exercised a managerial function with respect to the secretarial staff, and the record showed he instructed two staff members to submit fraudulent deferment and forbearance forms and to mail checks on behalf of student borrowers nearing default. The court found his leadership was relevant conduct which supported an adjustment on the money laundering count.

United States v. DeGovanni, 104 F.3d 43 (3d Cir. 1997). The district court erred in enhancing the defendant's sentence as a "supervisor" for purposes of §3B1.1(c) based on his de jure position as a squad sergeant in the police department, without any evidence that he actually supervised the illegal activity of the other police involved in the offenses. The defendant pleaded guilty to interference with interstate commerce by robbery and obstruction of justice but asserted that the meaning of "supervisor" as defined by the Guidelines was beyond the scope of his activity. He characterized his role as no more than a passive one. The circuit court agreed and held that, in the context of §3B1.1(c), the 2-level enhancement applies only when the "supervisor" is a supervisor in the criminal activity. The defendant was not such a supervisor simply because of his position as workplace supervisor in the police department hierarchy. The case was remanded for resentencing.

§3B1.2 Mitigating Role

United States v. Haut, 107 F.3d 864 (3d Cir.), *cert. denied*, 118 S. Ct. 130 (1997). The district court did not err in finding that the defendants were minimal participants under §3B1.2(a). At sentencing for conspiracy to commit malicious destruction of property by means of fire, 18 U.S.C. § 371, the district court decreased the defendants' offense levels by four points based on minimal participation in the offense. The Government challenged this finding. The commentary to §3B1.2 states that minimal participants are "among the least culpable of those involved in the conduct of a group." The district court found that the defendants did not have a financial interest in the bar they had burned and did not financially benefit from the arson. The Circuit court stated that it was correct to examine the economic gain and physical participation of the defendants, as well as assess "the demeanor of the defendants and all the relevant information to ascertain [their] culpability in the crime." While the circuit court stated that the district court's finding "may have been `generous'," the determination that the defendants were minimal participants was correct.

United States v. Holman, 168 F.3d 655 (3d Cir. 1999). The district court did not err in finding that the defendant did qualify for a mitigating role adjustment. The defendant pled guilty to possession with intent to distribute cocaine. The total amount of cocaine attributed to the conspiracy was fifty kilograms, and the defendant admitted being a distributor and that ten kilograms were attributable to him. The district court did not clearly err in finding that a distributor in a conspiracy to distribute ten kilograms is not entitled to a mitigating role adjustment.

United States v. Romualdi, 101 F.3d 971 (3d Cir. 1996). The district court erred in granting the defendant a downward departure for minimal or minor participation in an offense of possession of child pornography, 18 U.S.C. § 2252(a)(4). The defendant pleaded guilty to possession of child pornography and the government recommended a 12-month sentence, the bottom of the 12-18 month sentencing range. Although a mitigating role reduction was not available to the defendant under §3B1.2 because the offense of possession is a "single person" act which does not involve concerted action with others, the district court departed down from the Guidelines by analogy to that guideline. The district court sentenced the defendant to three year's probation, six months of which would be served in home confinement, and a $5,000 fine, citing the Third Circuit's opinion in United States v. Bierley, 922 F.2d 1061 (3d Cir. 1990), concerning departures analogous to mitigating role reductions. The government argued that the district court improperly departed under the holding in Bierley because to qualify for a mitigating role reduction, or an analogous departure, the offense must involve more than one participant. The defendant asserted that his act of possession was a minimal part of a larger distribution ring that was directed and controlled by other persons. He reasoned that had the other people involved in the scheme not been undercover agents, he would have been entitled to a sentence reduction. The circuit court rejected this argument and declined to extend Bierley to single actor offenses, agreeing with the Government's position. The circuit court further noted that the defendant already received the benefit a lower offense level because his charge and conviction of simple possession, a five-year maximum and guideline level 13 offense, was significantly less serious than the ten-year maximum, guideline level 15 for receipt warranted by his actual conduct. In overturning the departure, the appellate court noted that the commentary to §3B1.2 provides that a reduction for a

mitigating role "ordinarily is not warranted" where a defendant is convicted of an offense significantly less serious than that warranted by his actual conduct.

§3B1.3 Abuse of Position of Trust or Use of Special Skill

United States v. Cianci, 154 F.3d 106 (3d Cir. 1998). The district court did not err in considering uncharged conduct in applying an enhancement for abuse of a position of trust. The defendant was convicted of tax evasion after he used his position as an executive in an electronics firm to devise a scheme involving a shall corporation and falsified documents to embezzle and sell the company's products. He then concealed income from these sales from the IRS. The district court applied the abuse of trust enhancement based on the trust relationship the defendant had with his employer. The court of appeals held that, even though the defendant's employer was not the victim of the tax evasion, the offense of conviction, the defendant's uncharged criminal conduct toward the company was relevant for purposes of the enhancement. No language in the applicable guideline requires that the victim in the trust relationship be the victim of the offense of conviction.

United States v. Urban, 140 F.3d 229 (3d Cir.), *cert. denied*, 119 S. Ct. 123 (1998). The district court did not err in enhancing the defendant's sentence for use of a special skill. The defendant, who was convicted of possession of an unregistered destructive device (components of a canister grenade) argued that he had received no special training or education. The court of appeals held that it was sufficient that the defendant was self-taught in the construction of the destructive device, using his mechanical background and training and his own research and experimentation.

§3B1.4 Use of a Minor To Commit a Crime

United States v. Mackins, 218 F.3d 263 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 828 (2001). The district court did not err in applying a two-level upward adjustment for the defendant's use of a minor in committing the offense. The defendant pled guilty to conspiracy to distribute and possession with intent to distribute crack cocaine. He conceded that an individual involved in the conspiracy was not over 18 years of age throughout the course of the conspiracy. However, he argued the district court erred in raising the applicability of the enhancement *sua sponte*, and that it erred in imposing the adjustment, claiming the record lacked "a factual basis for determining that [the juvenile] became part of the conspiracy while still a minor." The Third Circuit found the district court did not err by raising the issue because the parties had been notified and given an opportunity to brief the issues prior to sentencing. Further, the court held the defendant's contention that the record was not clear contradicted his concession before the district court that "[the juvenile] was not over 18 years of age throughout the course of the conspiracy."

Part C Obstruction

§3C1.1 Obstructing or Impeding the Administration of Justice

United States v. Imenec, 193 F.3d 206 (3d Cir. 1999). The Third Circuit held that §3C1.1 requires a two-level enhancement for obstruction of justice when a defendant fails to appear at a

judicial proceeding, state or federal, relating to the conduct underlying the federal criminal charge. The defendant was arrested after selling crack cocaine to undercover Philadelphia police officers, and charged in state court. He was ordered to appear in state court for a preliminary hearing. Before the hearing, the court issued a federal arrest warrant for federal drug offenses based on the same events. Federal authorities intended to arrest the defendant when he attended the preliminary hearing but he never appeared in state court. The following year, a federal grand jury returned an indictment against the defendant. After his arrest a few years later, the defendant pled guilty to conspiracy to distribute cocaine base in violation of 21 U.S.C. § 846, and the court sentenced him to 151 months of imprisonment. In rejecting the defendant's argument that §3C1.1 was inapplicable, the appellate court held that the term "instant offense" in §3C1.1 refers to the criminal conduct underlying the specific offense of conviction and that the term was not limited to the specific offense of conviction itself. The appellate court reasoned that the rationale underlying the obstruction of justice enhancement (*i.e.*, that a defendant who commits a crime and then makes an unlawful attempt to avoid responsibility is more threatening to society and less deserving of leniency than a defendant who does not so defy the criminal justice process) applies with equal force whether the investigation is being conducted by state or federal authorities.

United States v. Kim, 27 F.3d 947 (3d Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995). The district court did not err in enhancing the defendant's sentence for obstruction of justice pursuant to §3C1.1. The defendant was originally indicted for conspiracy to distribute methamphetamine in violation of 21 U.S.C. § 846 and for possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841. He argued that his false cooperation related only to the conspiracy count of which he was acquitted; thus the obstruction of justice could not relate to the "instant offense." *See* §3C1.1. Although the circuit court acknowledged that the defendant's false cooperation related to the conspiracy count, that fact alone did not preclude the obstruction of justice from also relating to the possession count. The facts as a whole supported the conclusion that the defendant's conduct affected the "investigation, prosecution, or sentencing" of the possession offense even though the defendant's possession was complete when the government took the drugs.

United States v. Williamson, 154 F.3d 504 (3d Cir. 1998). The district court did not err in concluding that an upward adjustment for obstruction of justice was mandatory once the court had determined that obstruction had occurred. The defendant argued that the failure of §3C1.1 to include words such as "must" or "shall" renders the guideline ambiguous as to whether the adjustment must follow a determination that the defendant has engaged in obstructive conduct. Under the rule of lenity, this ambiguity must be interpreted in a defendant's favor, the defendant argued. The court of appeals rejected this contention, finding that the logical structure of the guideline clearly commands that the increase be applied following a finding that the defendant willfully obstructed the administration of justice. This holding is consistent with that of all other circuits which have considered the question.

Part D Multiple Counts

§3D1.2 Groups of Closely-Related Counts

United States v. Ketcham, 80 F.3d 789 (3d Cir. 1996). The circuit court reversed and remanded the defendant's sentence for offenses involving the transportation and distribution of child pornography in interstate commerce in violation of 18 U.S.C. § 2252(a)(1), (a)(2), and (a)(4)(B). The district court correctly refused to group the defendant's offenses pursuant to §3D1.2(b) because each count involved different victims. The circuit court held that the primary victims that Congress sought to protect in the various sections of the Protection of Children Against Sexual Exploitation Act were the children, and not just society at large. Section 2252, by proscribing the subsequent transportation, distribution, and possession of child pornography, discourages its production by depriving would-be producers of a market. Therefore, since the primary victims of offenses under 18 U.S.C. § 2252 are the children depicted in the pornographic materials, and because the defendant's four counts of conviction involved different children, the district court correctly concluded that grouping the defendant's offenses pursuant to §3D1.2(6) was inappropriate. Nevertheless, the circuit court reversed the defendant's sentence, because it found that the district court's conclusion for purposes of section 2252 was inconsistent with the court's application of the 5-level increase under §2G2.2(b)(4) for engaging in "a pattern of activity involving the sexual abuse or exploitation of a minor." The court explained that "sexual exploitation" is a term of art, and that "a defendant who possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor even though the materials possessed, transported, reproduced, or distributed `involve' such sexual exploitation by the producer." "Section 2G2.2(b)(4) of the Guidelines singles out for more severe punishment those defendants who are more dangerous because they have been involved first hand in the exploitation of children." On remand, the defendant should be sentenced without the enhancement.

United States v. Vitale, 159 F.3d 810 (3d Cir. 1998). Third Circuit held that defendant was not entitled to have his wire fraud and tax evasion offenses grouped for sentencing purposes. The defendant embezzled approximately $12 million from his employer, and pled guilty to one count of wire fraud and one count of tax evasion. The district court refused to group the counts, and used the multi-count rules under §3D1.4 to increase defendant's base offense level two-levels, based on the number of units. The defendant argued that the wire fraud and tax evasion counts should be grouped under §3D1.2(c) because the wire fraud embodies conduct that is treated as a specific offense characteristic of the tax evasion count. The appellate court upheld the district court's decision not to group the offenses, relying on its decision in United States v. Astorri, 923 F.2d 1052 (3d Cir. 1991). The appellate court noted that if the counts are to be grouped "there would be no accounting in the sentence for the fact that Vitale had evaded taxes, and in effect his conviction on that count would be washed away." Vitale at 814. The court added that the two-level enhancement to the tax evasion count (raising it from level 21 to 23) cannot affect the offense level of the higher wire fraud charge (level 25). The court stated: "[b]ecause the two-point adjustment to the tax evasion offense level has no significance to and does not in fact adjust the overall sentence, it does not cause the kind of adjustment referred to in §3D1.2(c)." The court concluded that evading taxes on $12 million is patently "significant additional criminal conduct" which would not be punished if the counts were grouped. The appellate court rejected the defendant's argument that Astorri should not be controlling, and that the court should follow the reasoning in United States v. Lieberman, 971 F.2d 989 (3d Cir. 1992), and the reasoning of the Sentencing Commission. In Lieberman, the Third Circuit observed that there might be situations where embezzlement and tax evasion should be grouped. The appellate court in Vitale,

distinguished Lieberman, stating that Vitale was charged with wire fraud and tax evasion, not embezzlement. The court also rejected the reasoning of the Fifth Circuit in United States v. Haltom, 113 F.3d 43 (5th Cir. 1997) (mail fraud and tax evasion counts involving the proceeds of the mail fraud are to be grouped under §3D1.2(c)). Additionally, the appellate court rejected the reasoning of the 1992 Sentencing Commission in its Most Frequently Asked Questions About the Sentencing Guidelines, Volume VII, Question No. 45 which states that tax evasion and the conduct generating the income should "always" be grouped, regardless of whether the enhancement under §2T1.1(b)(1) was applied. The appellate court stated: "[t]he response fails to address circumstances where an intended penalty is transformed into a sentence reduction." The court added that the disclaimer listed by the Sentencing Commission's Training Staff states that the information is not binding by the courts. Therefore, the district court was correct in refusing to group the wire fraud and tax evasion counts.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Ceccarani, 98 F.3d 126 (3d Cir. 1996), *cert. denied*, 519 U.S. 1155 (1997). In this case of first impression, the Third Circuit joined with the First, Fifth, Seventh, Eighth and Eleventh Circuits in holding that a sentencing judge may consider unlawful conduct committed by the defendant while on pretrial release awaiting sentencing, as well as any violations of the conditions of this pretrial release, in determining whether to grant a reduction in the offense level for acceptance of responsibility under §3E1.1. United States v. O'Neil, 936 F.2d 599 (1st Cir. 1991); United States v. Watkins, 911 F.2d 983 (5th Cir. 1990); United States v. McDonald, 22 F.3d 139 (7th Cir. 1994); United States v. Byrd, 76 F.3d 194 (8th Cir. 1996); United States v. Scroggins, 880 F.2d 1204 (11th Cir. 1989), *cert. denied*, 494 U.S. 1083 (1990). *But see* United States v. Morrison, 983 F.2d 730 (6th Cir. 1993) (holding that acceptance of responsibility considers only conduct related to the charged offense). In this particular case, the sentencing court denied the defendant's request for an acceptance of responsibility adjustment after considering several factors, including that the defendant tested positive for drug use on five different occasions during his pretrial release period in violation of the written conditions of his release. The appellate court noted that §3E1.1 Application Note 1 sets forth a number of non-exhaustive factors which may be considered in determining whether a defendant has accepted responsibility for his conduct. Included among the factors is consideration of whether the defendant undertook post-offense rehabilitative efforts under §3E1.1, comment. (n.1(g)). The appellate court based its determination upon the notion that defendant's post-offense conduct, although unrelated to the offense conduct, sheds light on the genuineness of the defendant's claimed remorse. A plea or confession does not necessarily evince a genuine sense of remorse or an intent to pursue lawful activity. Finally, because courts consider a defendant's post-offense rehabilitative efforts in granting an acceptance of responsibility adjustment, it is consistent to consider the absence of such efforts in denying an adjustment.

United States v. Cohen, 171 F.3d 796 (3d Cir. 1999). The district court erred in interpreting §3E1.1 when it awarded the defendant a two-level reduction for acceptance of responsibility, after the defendant was convicted at trial on some charges and then pled guilty to

the remaining charges. The government argued that the defendant should not have received the reduction because he went to trial on some of the counts. Under §3E1.1 , comment. (n.2), subject to rare exceptions, the adjustment for acceptance of responsibility "is not intended to apply to a defendant who puts the Government to its burden of proof at trial by denying the essential elements of guilt, is convicted, and only then admits guilt and expresses remorse." The application note does not violate a defendant's right to trial but creates a constitutional incentive for a defendant to plead guilty. The guidelines require the court to group the multiple counts of conviction before determining whether to apply the adjustment for acceptance of responsibility. The determination requires the court to make a "totality" assessment, including the defendant's decision to plead guilty to some of the counts only after being convicted of the other counts.

United States v. Sally, 116 F.3d 76 (3d Cir. 1997). As an issue of first impression for the Third Circuit, the court held that "post-offense rehabilitation efforts, including those which occur post-conviction, may constitute a sufficient factor warranting a downward departure provided that the efforts are so exceptional as to remove the particular case from the heartland in which the acceptance of responsibility guideline was intended to apply." The circuit court, adopting the Fourth Circuit's decision in United States v. Brock, 108 F.3d 31, 32 (4th Cir. 1997), and its analysis of Koon v. United States, 116 S. Ct. 2036 (1996), held that the factor of "post-offense rehabilitation" had not been forbidden by the Sentencing Commission as a basis for departure under the "appropriate" circumstances. The case was remanded for the district court to determine whether the defendant's post-conviction rehabilitation efforts were so extraordinary or exceptional to qualify him for a downward departure.

United States v. Zwick, 199 F.3d 672 (3d Cir. 1999). The district court erred in not applying an additional one point reduction in the offense level for acceptance of responsibility based on the fact that the government was compelled to prepare for trial. The defendant pled guilty to bank fraud and mail fraud. After trial, the defendant was convicted of theft or bribery concerning programs receiving federal funds. At sentencing, the district court awarded the defendant a two point reduction for his acceptance of responsibility, but rejected the additional one point reduction, stating he was not entitled because the government was required to prepare for trial on one count. The Third Circuit held §3E1.1(b) requires that the defendant timely provide complete information but did not require, either expressly or impliedly, that the defendant actually forego a trial. The Court further stated if the Commission intended to "limit the award of the point to situations in which a plea was entered, or resources were actually conserved, they could have crafted the language to reflect this intention."

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Mackins, 218 F.3d 263 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 828 (2001). The district court did not err in holding a prior sentence imposed as a result of an *Alford*

plea qualified as a "prior sentence" for purposes of computing the defendant's criminal history category. The defendant pled guilty to conspiracy to distribute and possession with intent to distribute crack cocaine, and argued there would only be an adjudication of guilt usable in calculating his criminal history if he had acknowledged factual guilt as a result of a guilty plea in his previous conviction, had been found to be factually guilty as a result of a trial, or had acknowledged the government has sufficient evidence which, if found credible, would support a finding of guilty. Because there must always exist some factual basis for a conclusion of guilt before a court can accept an *Alford* plea, the Third Circuit concluded the plea an adjudication of guilt and is no different than any other guilty plea for purposes of §4A1.1.

§4A1.2 Definitions and Instruction for Criminal History

United States v. Elmore, 108 F.3d 23 (3d Cir. 1996), *cert. denied*, 118 S. Ct. 110 (1997). The district court did not err in calculating the defendant's criminal history by assessing criminal history points for prior offenses involving harassment and assault and assigning two criminal history points on the basis of an outstanding warrant. The defendant first contends that his prior convictions for harassment and assault should be excluded from his criminal history because the conduct underlying these offenses is similar to disorderly conduct, an offense excluded under §4A1.2(c)(1). The court rejected this argument because the statutory definitions of the offenses at issue are not similar to that of disorderly conduct. With respect to the harassment conviction under Pennsylvania law, the Pennsylvania statute defines harassment as "violent, unruly or offensive behavior directed at an individual" whereas disorderly conduct covers similar types of behavior directed at the public at large. The defendant's conviction for assault involved conviction for a specific statutory offense which the court concluded could not be similar to disorderly conduct. While all criminal activity may justifiably be said to cause public inconvenience, annoyance or alarm, a conviction for a specific crime other than disorderly conduct demonstrates that a defendant has done more than disrupt the peace. The court concluded that comparison of the statutory elements of the two offenses, without an inquiry into the underlying factual similarities, is sufficient to ensure that an offense which is similar to disorderly conduct does not give rise to criminal history points merely because it is designated differently in another jurisdiction. The defendant next argued that he should not have been assigned criminal history points despite the fact that he had a violation warrant outstanding, because the Florida law enforcement officials never tried to execute the warrant. The court rejected this argument. The plain language of the guidelines indicates that two points are to be added whenever an outstanding warrant is in existence, regardless of whether it is stale at the time of sentencing.

§4A1.3 Adequacy of Criminal History Category (Policy Statement)

United States v. Fordham, 187 F.3d 344 (3d Cir. 1999). The district court had authority to depart upward, pursuant to §4A1.3 based on the defendant's foreign conviction. The defendant pled guilty to conspiracy to commit money laundering. The defendant's sentence was based on Criminal History Category I. In 1990, the defendant was arrested by Mexican Police while carrying 3.7 kilograms of marijuana which intended to transport to the United States. He was convicted and sentenced in Mexico, but his conviction was not counted as criminal history points, pursuant to §4A1.2(h). The district court found that the defendant's Criminal History Category I

significantly under-represented the seriousness of his criminal history, and departed to Criminal History Category II. The defendant appealed, arguing that the district court erred when it adjusted upward his criminal category because not only did it lack reliable information concerning the foreign conviction, but the information that it possessed pertained solely to a single offense that was not serious in nature. The appellate court held that although the district court acknowledged that it was not certain whether the Mexican authorities adhered to due process in sentencing the defendant, the district court was within its discretion to hold that the conviction was fair. The court noted that the defendant would have occupied the higher category had the foreign conviction been counted in computing his criminal history category before departure. Therefore, the upward departure was not an abuse of discretion.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Dorsey, 174 F.3d 331 (3d Cir. 1999). The district court properly counted as a "crime of violence" the defendant's Pennsylvania conviction for simple assault. The offense was a prior felony conviction because under Pennsylvania law, even though classified as a misdemeanor, it was punishable by more than one year. Simple assault, as defined in Pennsylvania, is a crime of violence because the offense involves "conduct that presents a serious potential risk of physical injury."

United States v. Johnson, 155 F.3d 682 (3d Cir. 1998). The district court properly concluded that it lacked authority to allow a downward adjustment for the defendant's minor role in the offense when the career offender provision applied. The defendant argued that he was entitled to the role adjustment based on the fact of the case and the government's stipulation. The court of appeals noted that the sequence of the guideline application instructions in §1B1.1 indicates that downward adjustments are allowed only for acceptance of responsibility after career status is imposed. Section 4B1.1 presupposes that the court has previously calculated the "offense level otherwise applicable," which would incorporate any adjustment for role in the offense. It provides that the court should apply that offense level or the one in the table, whichever is greater. The only exception to the offense level in the table is an adjustment for acceptance of responsibility. Other adjustments are effectively overwritten by the magnitude of the career offender upward adjustment.

United States v. Shabazz, 233 F.3d 730 (3d Cir. 2000). The district court did not err in finding a prior state conviction for employing a minor in the distribution of a controlled substance qualified as a predicate controlled substance offense under the career offender provision. The defendant pled guilty to conspiracy to possess heroin with intent to distribute and possessing counterfeit security with intent to deceive. The Presentence Report determined the defendant had two prior felony convictions that were classified as either crimes of violence or a controlled substance offense under §4B1.1. One of those convictions was for a state offense for employing a juvenile in a drug distribution scheme. The defendant claimed this state crime was akin to a solicitation offense as defined in the guidelines and should not be used as a predicate offense for application of the career offender provision. The Third Circuit stated to classify a prior

conviction as a predicate controlled substance offense, it must be established that the defendant committed, caused, or facilitated one of the acts specified in §4B1.2(2). Although the record is unclear for which act the defendant was formerly charged, and the state statute criminalizes different acts that may or may not be controlled substance offenses for purposes of §4B1.1, the Court stated his actual conduct controls. Because the defendant acknowledged he used a 17-year-old juvenile as a lookout while preparing to sell a large quantity of cocaine, the Court found it was sufficiently demonstrated he was actually using others, including a juvenile, to facilitate the distribution of the drug.

§4B1.2 Definitions for Career Offender

United States v. Taylor, 98 F.3d 768 (3d Cir. 1996), *cert. denied*, 519 U.S. 1141 (1997). The district court did not err in designating the defendant as a career offender pursuant to §4B1.1. After a guilty plea, the defendant was sentenced as a career offender based on a previous aggravated assault and two convictions for statutory rape. A 1980 statutory rape conviction was at issue on appeal. The Third Circuit has held that the sentencing court "should look solely to the conduct alleged in the count of the indictment charging the offense of conviction" to determine if an offense qualifies as a crime of violence. Joshua v. United States, 976 F.2d 844 (3d Cir. 1992). With regard to the 1980 conviction, Count One charged the defendant with statutory rape, and Count Three, charging the defendant with indecent exposure, alleged that the defendant "forced [the victim] onto her bed and while holding her down . . . ." The district court noted the decisions of several circuit courts of appeals addressing whether sex offense convictions constitute crimes of violence, *see* United States v. Bauer, 990 F.2d 373 (8th Cir. 1993) (holding sexual intercourse with child under 16 constitutes a crime of violence); United States v. Wood, 52 F.3d 272 (9th Cir.) (holding indecent liberties with a minor crime of violence), *cert. denied*, 516 U.S. 881 (1995); United States v. Reyes-Castro, 13 F.3d 377 (10th Cir. 1993) (finding sexual abuse a crime of violence under 18 U.S.C. § 16(b)). However, the appellate court did not need to determine whether statutory rape was a crime of violence per se, because the counts of conviction specifically alleged conduct creating a "potential risk of physical harm" sufficient to satisfy the guideline. The defendant asserted that the district court erroneously relied on the indecent exposure count to find a crime of violence in the 1980 offense. First, he alleged the district court inappropriately relied on the indecent exposure count because it was not cited as one of the three prior crimes of violence. Second, he contended that in using the statutory rape conviction as the predicate offense, the court could only look to the charging language for that count, and not to the indecent exposure count. The appellate court found that despite the original reference to statutory rape, the district court was clear in its consideration of the three separate 1980 counts of conviction, in sum, for purposes of assessing criminal history. Finding that the facts alleged in the indecent exposure count clearly demonstrated a potential for serious injury to the victim, the appellate court held that the district court's determination that the defendant was a career offender was correct.

§4B1.4 Armed Career Criminal

United States v. Bennett, 100 F.3d 1105 (3d Cir. 1996). The district court did not err in determining that the defendant's three Pennsylvania burglary convictions qualified as predicate

offenses for purposes of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). The defendant pleaded guilty to possession of a firearm by a felon, 18 U.S.C. § 922(g), and was sentenced under section 924(e) for violating 922(g) having previously been convicted of three "violent felonies" or "serious drug offenses." The defendant asserted that the Pennsylvania burglary statute was broader than the generic burglary definition in section 924(e) and, therefore, the Government had the burden of showing that the trier of fact found all of the elements of generic burglary. For purposes of section 924(e), burglary must have "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." In determining if the elements of generic burglary were found in defendant's three state convictions, the court could look to the indictment or information, jury instructions and the certified record of conviction. However, the defendant's counsel at trial "volunteered sufficient information concerning the conduct leading to Bennett's burglary convictions to satisfy us that the trier of fact necessarily found all of the elements of generic burglary for each of those prior convictions." Nothing prevents a court from relying on information "having its source in the defense rather than in the prosecution." The circuit court found the elements of general burglary to be included in the three state burglary convictions and, therefore, enhancement under section 924(e) was proper.

United States v. Cornish, 103 F.3d 302 (3d Cir.), *cert. denied*, 520 U.S. 1219 (1997). The Government appealed the district court's determination that the defendant's prior third degree robbery conviction was not a "violent felony" for purposes of the Armed Career Criminal Act, 18 U.S.C. § 924(e). At sentencing, the district court held that the defendant's prior conviction for third degree robbery in Pennsylvania was not a "violent felony" and, therefore, the defendant did not have the third prior violent offense necessary for the application of § 924(e)'s enhanced penalty provisions. The appellate court held that the appropriate method for determining whether a particular offense qualifies as a "violent felony" is the categorical approach, which allows the court to look only to the statutory definition of the prior offense, or when necessary, the indictment or information papers and the jury instructions. The appellate court noted that in Taylor v. United States, 495 U.S. 575, 577 (1990), the Supreme Court considered the application of 18 U.S.C. § 924(e) where the issue was whether second-degree burglary under Missouri law qualified as a "violent felony", and held that the meaning of burglary for purposes of section 924(e)(2)(B)(ii) was not dependent on the state's definition of burglary. Rather, the offense will be deemed to qualify as a violent felony if "its statutory definition substantially corresponds to `generic' burglary, or the charging papers and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." The appellate court noted two prior Third Circuit cases in which the court found robbery offenses to constitute a violent felony. United States v. Preston, 910 F.2d 81 (3d Cir. 1990), *cert. denied*, 498 U.S. 1103 (1991) (finding criminal conspiracy to commit robbery a violent felony after finding its elements to incorporate the elements of robbery); United States v. Watkins, 54 F.3d 163 (3d Cir. 1995) (finding Pennsylvania robbery conviction a violent felony as it necessarily involved the use or threat of physical force). The appellate court examined the Pennsylvania Supreme Court's interpretation of the Pennsylvania robbery statute, wherein it held that "[A]ny amount of force applied to a person while committing a theft brings the act within the scope of robbery under [the Pennsylvania statute] . . . so long as [the force] is sufficient to separate the victim from his property . . . ." Commonwealth v. Brown, 484 F.2d 738, 741 (Pa. 1984). The offense at issue was a third degree robbery, which requires "physically tak[ing] or remov[ing] property from the person of another by force however slight." 18 Pa. Cons. Stat. Ann § 3701(a)(1)(v). Based on a literal reading of the statute and the noted case

law, the U.S. Court of Appeals for the Third Circuit held that, regardless of degree, any conviction under the Pennsylvania robbery statute constitutes a "violent felony." The case was remanded for resentencing applying 18 U.S.C. § 924(e).

United States v. Mack, 229 F.3d 226 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 2015 (2001). The district court did not err in finding the defendant received adequate notice, for due process purposes, of the government's intent to seek sentencing under the Armed Career Criminal Act, nor did it err in holding the preponderance of the evidence standard governed the applicability of the firearm enhancement at §4B1.4(3)(A). The defendant was convicted of being a felon in possession of a firearm after shooting someone outside a bar. With the application of the armed career criminal enhancement, the defendant received a criminal history of VI, and a total offense level of 34, and was sentenced to 262 months. Without application of the enhancement, his criminal history category would have only been a IV. After receiving the Presentence Report (PSR) stating he was subject to sentencing under the ACCA, he claimed he did not receive *pretrial* notice that the government intended to seek an enhanced sentence, stating the importance of pretrial knowledge of the government's intent to request its application in deciding whether to plead guilty or go to trial. Agreeing with its sister circuits, the Third Circuit held pretrial notice was not required under the ACCA, and further found the defendant received adequate notice for due process concerns. He received actual notice prior to trial by verbal communications with the government, he received notice from the PSR, and he received formal notice ten days before trial. *See* United States v. O'Neal, 180 F.3d 115, 125 (4th Cir.), *cert. denied*, 528 U.S. 980 (1999); United States v. Mauldin, 109 F.3d 1159, 1163 (6th Cir. 1997); United States v. Hardy, 52 F.3d 147, 150 (7th Cir. 1995); United States v. Bates, 77 F.3d 1101, 1105 (8th Cir. 1996); United States v. Gibson, 64 F.3d 617, 625 (11th Cir. 1995). The defendant further argued that the ACCA enhancement was so substantial it required the district court to find by clear and convincing evidence that he shot the victim, instead of a preponderance of the evidence standard. However, the Court found that the sentence increase did not approach either a three-fold or twelve-fold increase as in previous cases where it had held a clear and convincing standard was required, and the preponderance of the evidence standard was appropriate. *See* United States v. Paster, 173 F.3d 206, 216 (3d Cir. 1999) (applying the clear and convincing standard when reviewing a nine-level upward departure that increased the guideline range from 108 to 135 months to 292 to 365 months).

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.1 Imposition of a Term of Imprisonment

United States v. Serafini, 233 F.3d 758 (3d Cir. 2000). The district court did not err in recommending to the Bureau of Prisons that the imprisonment portion of the defendant's sentence be served in a residential program. The defendant, a state legislator, was convicted of perjury before a grand jury, and the government appealed a portion of the sentence in which the court stated it "recommends that the Bureau of Prisons designate . . . [a] Residential Program . . . as the place for service of this sentence." The Third Circuit stated that had the court imposed community

confinement, it would have violated the guidelines. However, because it only recommended community confinement, it was not a final order imposed by the court, and therefore the court had no jurisdiction to review the district court's recommendation.

§5C1.2 Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

United States v. Holman, 168 F.3d 655 (3d Cir. 1999). The Third Circuit refused to review whether the defendant would have been entitled to relief under the safety valve because §5C1.2 would not have helped him. The defendant faced a mandatory minimum sentence of ten years under 21 U.S.C. § 841(a)(1). The district court determined the applicable guideline range to be 108-135 months. Because the record indicated that the court determined the sentence without regard to the statutory minium, the defendant's sentence would have been the same even if he had qualified for the safety valve.

Part D Supervised Release

§5D1.3 Conditions of Supervised Release

See United States v. Brady, 88 F.3d 225 (3d Cir. 1996), *cert. denied*, 519 U.S. 1094 (1997), 18 U.S.C. § 3583, p. 40.

See United States v. Dozier, 119 F.3d 239 (3d Cir. 1997), 18 U.S.C. § 3583, p. 41.

See United States v. Evans, 155 F.3d 245 (3d Cir. 1998), 18 U.S.C. § 3583, p. 41.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution, Fines, Assessments, Forfeitures

United States v. Copple, 74 F.3d 479 (3d Cir. 1996). The district court erred in assessing a restitution order in the amount of $4,257,940 without making a finding with respect to defendant's ability to pay. Before ordering restitution, a court must consider the following factors: 1) the amount of loss, 2) the defendant's ability to pay and the financial need of the defendant and the defendant's dependents, and 3) the relationship between the restitution imposed and the loss caused by the defendant's conduct. United States v. Logar, 975 F.2d 958, 961 (3d Cir. 1992). The circuit court rejected the district court's conclusion that the defendant could pay because he was a college graduate who had been financially successful in the past. Such a finding does not reflect that the availability of financial resources with which to pay restitution depends not only on one's earning potential, but also on one's financial obligations. The district court also failed to make specific findings about the defendant's financial needs despite observing that "the family is in dire straits at this time," a statement which the appellate court did not find to be supportive of the large restitution amount ordered. The sentencing judge needed to explain how the defendant could meet his restitution obligations given his family obligations. Further, the circuit court noted that if the restitution order was an attempt to capture holdings which the defendant had not volunteered, such findings would need to be explicitly noted.

United States v. Kones, 77 F.3d 66 (3d Cir.), *cert. denied*, 519 U.S. 864 (1996). The district court did not err in concluding that appellant could not be awarded restitution under 18 U.S.C. §§ 3663-3664, the Victim and Witness Protection Act of 1982 (VWPA). The VWPA provides that a defendant make restitution to "any victim of such offense," which has been interpreted to allow restitution "only for the loss caused by the specific conduct that is the basis of the offense of conviction." Hughey v. United States, 495 U.S. 411, 413 (1990). The VWPA was amended to allow restitution where a scheme, conspiracy, or pattern of criminal activity was an element of the offense of conviction. Under this provision, a victim is entitled restitution if they are harmed directly by the criminal conduct; "direct" is interpreted to require the harm to be closely related to the underlying scheme. The defendant pleaded guilty to mail fraud counts related to insurance claims for never performed medical services. Appellant, who was one of the patients for whom non-existent medical services were claimed, asserts that she is a "victim" due to malpractice by the defendant in proscribing excessive amounts of drugs to her to further his

underlying scheme. Since the conduct alleged by appellant is not covered by the mail fraud statute the defendant was convicted under, the circuit court held that appellant could not be considered a "victim" under the VWPA.

§5E1.2 Fines for Individual Defendants

United States v. Torres, 209 F.3d 308 (3d Cir.), *cert. denied*, 531 U.S. 864 (2000). The district court did not err in imposing a fine without making specific findings on the record. The defendant opened a money market account in a false name and deposited a total of $66,262.59 into the account using a stolen U.S. Treasury check and a third-party check. The defendant attempted to withdraw $24,900 but was not successful because the bank suspected the account was fraudulent, and he pled guilty to bank fraud. The district court imposed a $5,000 fine under §5E1.2, within the permissible guideline range of $2,000 to $1,000,000, to be paid in equal monthly installments over his five year period of supervised release. The Third Circuit found while the district court did not make an explicit finding of the defendant's ability to pay, it implicitly did so when it stated it could impose a fine within the guideline range only if the defendant had the ability to pay that fine, and then imposed a fine within the range. Further, the facts at the district court's disposal in determining the defendant's ability to pay included his young age, his receipt of a high school and associates degree, his ability to speak four languages, and the fact he has held several short-term positions and had served in the Army Reserves. These facts were unchallenged by the defendant, and supported the imposition of the $5,000 fine.

Part G Implementing the Total Sentence of Imprisonment

§5G1.3 Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment

United States v. Brannan, 74 F.3d 448 (3d Cir. 1996). The district court erred in believing it lacked authority to "give credit" for an undischarged state sentence and had no choice but to sentence defendant to a concurrent term. The district judge correctly looked to §5G1.3(c), but, erroneously read it to indicate that a concurrent sentence was required unless it believed an incremental punishment was required, in which case the sentence should run consecutively. Although expressing "discomfort" in doing so, the district judge did not see a need for an incremental punishment and, therefore, imposed a 100 month sentence concurrent with the undischarged term. The circuit court stated that §5G1.3(c) should be applied to determine a sentence had all of the offenses been federal offenses sentenced at the same time. The court noted that such a determination may involve an approximation and can be a departure. The court stated that the guideline is designed to "determine the appropriate sentence, and if as a result the sentence is less than the guideline sentence for the second offense, the guidelines and Holifield [United States v. Holifield, 53 F.3d 11 (3d Cir. 1995)] permit—but do not require or even encourage—this result." The court also noted that under the methodology of §5G1.3(c), the court may recognize time already served for the undischarged sentence. The circuit court remanded the sentencing to give the district court judge the opportunity to resentence the defendant in accordance with the opinion.

United States v. Dorsey, 166 F.3d 558 (3d Cir. 1999). The district court erred in deciding that only the Bureau of Prisons has authority to grant custody credits. The defendant received a five-year sentence in state prison for a firearms offense. Ten months later, he was sentenced to 115 months in federal court for offenses arising from the same firearms offense. The district court rejected the defendant's argument that he was eligible for credit for the time he had served in state prison. Application note 2 to § 5G1.3(b) authorizes the court to credit the defendant for the ten months he served between the state sentencing and the federal sentencing, which the BOP did not credit toward the federal sentence.

United States v. Saintville, 218 F.3d 246 (3d Cir.), *cert. denied*, 121 S. Ct. 417 (2000). The district court did not err in applying §5G1.3 when it sentenced a defendant who was subject to an undischarged term of imprisonment for a separate offense. The defendant pled guilty to illegal entry into the United States following deportation for an aggravated felony. After an indictment was returned for his reentry violation, he was convicted in state court for possession of cocaine with intent to distribute and conspiracy to deliver cocaine. He requested the district court run his sentence for the illegal reentry concurrently with his state sentence. The district court, however, sentenced him to 46 months' imprisonment, the lowest available sentence in the guideline range, with ten months to run concurrently and the remainder to run consecutively to his state sentence. The defendant contends the district court erred because it failed to consider the hypothetical combined sentencing range which would have applied if the United States had prosecuted both the unrelated state charge and the illegal reentry offense in the district court. The Third Circuit agreed with other circuit courts, and found after §5G1.3 and its commentary were amended in 1995, a sentencing court no longer must make the hypothetical calculation. Because a previous requirement in §5G1.3 that the court run a sentence consecutively, to the extent necessary to achieve a reasonable "incremental" punishment for the instant offense, was deleted in the amendment, the Court found the guideline section no longer ties the newly imposed sentence to any undischarged term of imprisonment. *See* United States v. Velaquez, 136 F.3d 921, 923-25 (2d Cir. 1998); United States v. Mosley, 200 F.3d 218, 222-25 (4th Cir. 1999); United States v. Luna-Madellaga, 133 F.3d 1293, 1294-96 (9th Cir. 1998).

United States v. Spiers, 82 F.3d 1274 (3d Cir. 1996). The district court did not err in declining to impose §5G1.3's suggested penalty. At sentencing the district court found that the defendant did not deserve a concurrent sentence. Instead, the district court ordered the defendant to serve a 110-month federal sentence to run consecutively from the completion of his 50-year state sentence. The defendant argues that the reasons offered by the district court when it rejected the suggested penalty are inadequate and that the resulting sentence was impermissibly indeterminate. On appeal, the court reaffirmed its holding in United States v. Holifield, 53 F.3d 11 (3d Cir. 1995), that, although a district court must determine the Guideline's suggested "reasonable incremental punishment" according to the commentary's methodology, the imposition of the commentary's suggested penalty remains within the district court's discretion. The court further held that the district court may impose a different penalty as long as it indicates its reasons for imposing the penalty in such a way as to allow the appellate court to see that it has considered the commentary's methodology. In addition, the court held that, because the date upon which practically any consecutive sentence will take effect is uncertain, a consecutive sentence will not be voided simply because its beginning or ending date is indeterminate.

Part H Specific Offense Characteristics

§5H1.11 Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)

United States v. Serafini, 233 F.3d 758 (3d Cir. 2000). The district court did not err in applying a three-level downward departure based on the defendant's charitable activities. The defendant, a state legislator, was convicted of perjury before a grand jury, and the government appealed, claiming the district court abused its discretion in awarding the downward departure. The district court was presented with numerous character witnesses and over 150 letters on behalf of the defendant. The Third Circuit stated that, while the letters which merely reflected the defendant's political duties ordinarily performed by public servants could not form the basis for the departure, the other letters which portrayed other community and charitable activities, and which involved not just the giving of money, but instead involved the giving of time and of one's self, made those activities exceptional. Therefore, a downward departure was warranted.

Part K Departures

§5K1.1 Substantial Assistance to Authorities

United States v. Khalil, 132 F.3d 897 (3d Cir. 1997). The defendant appealed the extent of the district court's downward departure pursuant to the government's §5K1.1 motion. The court of appeals held that it lacked jurisdiction to consider the appeal. Prior to the enactment of the guidelines, a sentence by a federal court within statutory limits was effectively not reviewable on appeal. The Sentencing Reform Act of 1984 allowed a defendant, under limited circumstances, to appeal his sentence. Among other things, it allows a defendant to appeal an upward departure and the government to appeal a downward departure. *See* 18 U.S.C. § 3742. However, the Act does not allow a defendant to appeal from a discretionary downward departure.

United States v. King, 53 F.3d 589 (3d Cir. 1995). The district court erred in departing downward pursuant to the government's §5K1.1 substantial assistance motion. The sentencing court incorrectly applied a "sentencing procedure" to determine the extent of the departure. The sentencing court must instead make an "individualized qualitative examination" of the defendant's cooperation. The case was remanded for resentencing.

§5K2.0 Grounds for Departure (Policy Statement)

United States v. Evans, 49 F.3d 109 (3d Cir. 1995). During the presentence investigation the defendant voluntarily revealed his true identity to the probation officer which, because of his criminal history, increased his sentence. The probation officer conceded that he would not have discovered the defendant's true identity if not for the defendant's own admission. Accordingly, the defendant argued that the district court should have departed downward based on his extraordinary acceptance of responsibility, and that the court did not so depart because it mistakenly believed it did not have the authority to do so. The appellate court found the district court's discussion of the departure ambiguous. Therefore, the court considered the issue of whether or not this factor is an

appropriate basis for departure. The court held that the disclosure of identity could constitute a "mitigating circumstance" within the meaning of guideline §5K2.0. The appellate court based its holding on the recent amendment to §5K2.0, which allows a judge to use a broad range of factors to depart as long as those factors promote the statutory purposes of sentencing. The case was remanded for resentencing for the district court determine whether a downward departure is appropriate.

United States v. Haut, 107 F.3d 213 (3d Cir.), *cert. denied*, 521 U.S. 1127 (1997). The district court erred in departing downward to mitigate the impact of a jury verdict the judge believed to be incorrect. At sentencing, the district court judge departed 6 levels down based on the incredibility of the prosecution witnesses and his belief that the defendants should have been found not guilty. Noting that Koon v. United States, 518 U.S. 81 (1996), states that a departure factor not mentioned in the guidelines must be examined to determine if it is "sufficient to take the case out of the Guideline's heartland," the Circuit court stated that this departure was "categorically inappropriate." The district court stated that certain prosecution witnesses were biased and the case been a bench trial he would have found the defendants not guilty. The district court asserted that for sentencing determinations, it was appropriate to make credibility determinations. The cases cited for this authority, however, are inapposite. One stands for the proposition that credibility may be taken into account with respect to "matters of degree concerning underlying issues," not the issue of guilt. United States v. Miele, 989 F.2d 659 (3d Cir. 1993) (stating court may take witness credibility into account when determining amount of drugs involved in the offense). The other two merely dictate how departures "ameliorate the rigidity" of the guidelines. *See* United States v. Gaskill, 991 F.2d 82 (3d Cir. 1993) (informing district court that departure for defendant responsible for care of his mentally ill wife could be permissible if circumstances warrant "to bring a fair and reasonable sentence"); United States v. Lieberman, 971 F.2d 989 (3d Cir. 1992) (allowing departure for extraordinary acceptance of responsibility; based on defendant's conduct rather than witness credibility). The circuit court noted that the district court may enter a judgment of acquittal if the circumstances of the case make the verdict unsupportable. Fed. R. Crim. P. 29. In this case, however, the district court found that a judgment of acquittal was not appropriate because the evidence, if believed, did support the verdict. The circuit court stated that to affirm the departure taken by the district court would "sap the integrity of both the Guidelines and the jury system."

United States v. Holmes, 193 F.3d 200 (3d Cir. 1999). The Third Circuit affirmed the district court's upward departure under §5K2.0 for "extraordinary" abuse of trust. The defendant, a disbarred attorney and accountant, pled guilty to an extensive fraud and forgery scheme and was sentenced to 96 months in prison, restitution of approximately $1.9 million, and a special assessment. The nature of the defendant's fraud was extensive: (1) in representing a client in a protracted business dispute, he fabricated a settlement agreement for a non-existent lawsuit, forged the signatures of opposing parties and judges, and embezzled the client's money, which had been deposited in an escrow account; (2) he forged the signature of a dying neighbor to redeem over $150,000 in bonds; (3) he created a fraudulent low income housing investment venture and spent the investors' money; (4) he embezzled money that clients had given him to pay off their taxes; (5) he prepared a false will and forged signature of deceased testator; and (6) he engaged in money laundering. Although the defendant had received enhancements for the amount of loss, §2F1.1(b)(1)(M); more than minimal planning, §2F1.1(b)(2)(A), for vulnerable victim, §3A1.1,

aggravating role, §3B1.1(a), and abuse of position of trust or use of a special skill, §3B1.3, the district court departed upwards two additional levels pursuant to §5K2.0 based upon Holmes' extraordinary abuse of position of trust because the court believed that two level enhancement for abuse of trust was insufficient. The Third Circuit affirmed, holding that the district court's decision to depart upward was "not made on a legally impermissible basis" and was "reasonable." It rejected the defendant's argument that §3B1.3 adequately covers abuse of position of trust because nothing in the Guidelines suggests that the Sentencing Commission "envisioned multiple acts of abuse of trust to the degree that was present in this case." The Third Circuit also rejected the defendant's argument that his abuse of trust was sufficiently accounted for by the other enhancements he received.

United States v. Iannone, 184 F.3d 214 (3d Cir. 1999). The district court did not err in granting a two-level upward departure based on a combination of factors. The defendant pled guilty to eight counts of fraud based out of a scheme in which the defendant defrauded people by encouraging them to invest in oil and gas drilling ventures, but then used the investor's money for his personal expenses rather than for the promised purposes. The district court imposed a two-level upward departure, pursuant to §5K2.0 based on a combination of factors that took the case out of the "heartland" of the fraud guideline. The district court identified the following five factors: 1) the defendant masqueraded as a decorated Vietnam combat veteran, a person in the witness protection program, and a government agent on a secret mission; 2) the defendant's misrepresentation that he had received several combat medals as well as a recommendation for the Congressional Medal of Honor; 3) his attempt to conceal his fraud by faking his own death; 4) his fabricated story about his family having been killed by a drunk driver; 5) severe psychological harm his fraud caused his victims. The district court noted that it found none of these factors justified departure by itself; but in combination, the factors made the case very unusual and justified a two-level departure. The appellate court classified the factors as "unmentioned" by the guidelines, and that the court must therefore, consider the structure and theory of both relevant individual guidelines and the guidelines taken as a whole and decide whether the factors are sufficient to take the case out of the guidelines's heartland. The appellate court examined each of the five factors and concluded that this combination of five unmentioned factors was sufficient to take the case out of the guidelines' heartland. The appellate court noted that §2F1.1, note 10 states that upward departures may be warranted in cases in which the loss does not fully capture the harmfulness and seriousness of the conduct. Furthermore, the appellate court concluded that the defendant's misrepresentations were similar to the two-level adjustment of §2F1.1(b)(3)(A), which provides a two-level increase in offense level, where the offense involved a "misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency." In addition, the appellate court concluded that §5K2.3 provides for an upward departure based on conduct similar to the defendant's. Section 5K2.3 specifically encourages courts to depart upward if the defendant's conduct caused his victim extreme psychological injury. While the district court did not find that the defendant's victims had suffered psychological injury, it did find that they had suffered a psychological injury more severe than that occurring in a typical fraud case and included this a reason for a departure. The appellate court concluded that these two analogies to conduct similar to the defendant's conduct further support the district court's finding that a §5K2.0 departure was appropriate.

United States v. Marin-Castaneda, 134 F.3d 551 (3d Cir.), *cert. denied*, 118 S. Ct. 1855 (1998). The district court did not err when it decided it did not have authority to depart based on (1) the defendant's willingness to consent to deportation; (2) his age; and (3) the deterrent effect of having been hospitalized after trying to smuggle heroin in his stomach. The court of appeals noted that the defendant was a Columbian national with no colorable basis for contesting deportation. The court held, as a matter of first impression, that a defendant without a nonfrivolous defense to deportation presents no basis for downward departure under §5K2.0 by simply consenting to deportation. The court also held that, due to the judiciary's limited power with regard to deportation, a district court cannot depart downward on this basis without a request from the government. The defendant's age, 67 at the time of sentencing, without more, did not justify a downward departure. Finally, the physical ordeal of being hospitalized after ingesting 90 heroin pellets is inherent in smuggling drugs in this manner, and so could not be considered an unusual characteristic sufficient to take this case out of the heartland.

United States v. Nathan, 188 F.3d 190 (3d Cir. 1999). The Third Circuit reversed the district court's upward departure pursuant to §5K2.0 and Application Note 2 to §2T3.1. The defendants were Electrodyne Systems Corporation (ESC), its president and marketing director. Notwithstanding their six contracts with the government to manufacture electronic component parts in the United States, and not to use foreign parts or manufacturing sites, they contracted with countries in Russia and the Ukraine to build the parts. ESC pled guilty to exporting defense-related items in violation of the Arms Export Control Act (AECA), and making false statements, 18 U.S.C. § 1001. The president of ESC pled to illegally importing goods into the U.S. because he failed to mark the items with the country of origin, 18 U.S.C. § 545. ESC's marketing director pled to unlawful introduction of merchandise into United States commerce, 18 U.S.C. § 542. The district court departed upwards by nine levels for the sentences of the two individual defendants because it determined that the duties evaded by the defendants did not adequately measure the harm they caused. Specifically, the district court found that four aspects of the defendants' conduct rendered this an "atypical" smuggling case: (1) that the defendants defrauded the government for their own financial gain; (2) that the defendants' actions compromised and may in the future compromise national security; (3) that they violated AECA; and (4) that they violated the Buy American Act (BAA), which permitted them to gain an unfair financial advantage. The Third Circuit held that (1) the district court incorrectly used the presence of fraud to find the case atypical because smuggling, by the terms of 18 U.S.C. §§ 542, 545, involve some element of fraud; (2) the record indicated that the government agreed that no sensitive information had been revealed and that the defendants' actions did not pose a threat to national security or the safety of the military; (3) that AECA is a smuggling offense because its terms specifically refer to the import and export of defense articles and services, 22 U.S.C. § 2778(b)(2); and (4) that while a violation of the BAA (a civil statute) could be considered to determine whether the defendants caused harm to "society or protected individuals to an extent not captured by the smuggling guidelines, it alone is insufficient to justify the magnitude of the departure in this case. Therefore, appellate court reversed the departure.

United States v. Nolan-Cooper, 155 F.3d 221 (3d Cir. 1998). The court of appeals vacated and remanded for the district court to determine whether an undercover agent's sexual misconduct with the defendant during the investigation was sufficient to take the case outside the heartland so as to justify a downward departure. It was not clear from the record whether the

district court declined to depart because it lacked authority to do so on this basis or because it did not believe departure was warranted. The court of appeals stated that, under Koon v. United States, 518 U.S. 81 (1996), government investigatory misconduct that is unrelated or only tangentially related to the guilt of the defendant is an unmentioned departure factor and is not categorically proscribed from consideration. On remand, the district court was to follow the dictates of Koon and §5K2.0 in determining whether departure was warranted.

United States v. Santiago, 201 F.3d 185 (3d Cir. 1999). The district court did not err in finding that the guideline provision authorizing a sentence outside the otherwise applicable guideline range did not authorize a downward departure from a mandated minimum statutory sentence. The defendant, who had a prior drug felony conviction, pled guilty to possession of a controlled substance with intent to distribute, and he was sentenced to the required mandatory minimum ten years' imprisonment. However, he contended the district court erred in denying his motion for a downward departure pursuant to §5K2.0, based on his argument that he had been the victim of a shooting accident that initially left him paralyzed. The Third Circuit found although the guidelines provided for a sentencing range of between 70 to 87 months incarceration, his prior federal conviction subjected him to the mandatory minimum sentence. The Third Circuit found that §5K2.0 did not apply stating it consistently speaks in terms of a departure from the guidelines, not from a statute, and found that the district court is not authorized to effectuate a downward departure from the minimum statutory sentence. Instead, the Court agreed with other circuits and found any deviation from the statutory minimum could only be had through the specific procedures established through 18 U.S.C. § 3553(e) or (f). *See* United States v. Daniels, 182 F.3d 910, (4th Cir. 1999); United States v. Brigham, 977 F.2d 317, 320 (7th Cir. 1992); United States v. Polanco, 53 F.3d 893 (8th Cir. 1995); United States v. Valente, 961 F.2d 133 (9th Cir. 1992).

United States v. Warren, 186 F.3d 358 (3d Cir. 1999). The Third Circuit reversed a district court's upward departure based upon §5K2.0 and Application Note 1 of §2D2.1. The district court departed upward because the drugs were not for personal consumption and because the extraordinary amount of drugs took the case out of the "heartland" of possession cases. The defendant in this case contacted the DEA in Belgium and informed them that he had been offered $15,000 to act as a drug courier. Although federal authorities initially attempted to set up a controlled delivery, they could not do it on the scheduled date of delivery. The defendant was unwilling to postpone the delivery date because he believed it would put him in danger. Upon arriving in the United States, the defendant admitted his drug possession to the Customs inspector, and federal authorities seized over 21,000 tablets of ecstasy. After pleading guilty, the district court departed upward to sentence him to 5 years of probation instead of the one-year probation term he otherwise would have received. In reversing, the Third Circuit recognized that large quantities of drugs can clearly take a routine possession case out of the heartland of possession cases to justify an upward departure under §5K2.0. It held, however, that quantity *per se* was insufficient to justify departure but that departure was warranted "only to the extent that they indicate the high probability that the drugs were intended not for mere possession, but for distribution for others." *Id.* at 364; *see also* §2D2.1, App. Note 1. The appellate court found that in this case, the evidence was unequivocal that the defendant did not intend anyone to consume the drugs he carried; and moreover, that he intended to turn the drugs over to government agents and did so.

§5K2.3 Extreme Psychological Injury (Policy Statement)

United States v. Jacobs, 167 F.3d 792 (3d Cir. 1999). The district court erred in departing upward in an aggravated assault case based on extreme psychological injury because the court failed to find that the victim's psychological injury was "much more serious than that normally resulting from commission" of an aggravated assault. The court found that the victim suffered from post-traumatic stress disorder, mood disorders, depression, anxiety and sleeplessness. The court also failed to provide reasons for the extent of the departure. The Third Circuit remanded the case and suggested that the court use §2A2.2(b) as a guide for making sufficient findings regarding the extent of injury.

§5K2.8 Extreme Conduct (Policy Statement)

United States v. Queensborough, 227 F.3d 149 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 894 (2001). The district court did not err in finding the Presentence Report (PSR) provided the defendant with the required notice it was contemplating an upward departure pursuant to §5K2.8 and Application Note 5 of §2A3.1 [now Application Note 6]. The defendant and a codefendant accosted a man and a woman, raped and assaulted the woman, assaulted the man, and forced the two victims to have sex as they watched. The defendant pled guilty to aggravated rape and carrying a firearm in relation to a crime of violence. For the aggravated rape, the district court granted an upward departure from a range of 121 to 151 months to 20 years. The defendant objected, claiming although he had been given notice of a possibility of an upward departure, he had not been given notice there would actually be an upward departure in his sentence. The district court found the language in the PSR, located underneath the heading "Factors that May Warrant Departure" which stated, "According to U.S.S.G. §2A3.1, Application Note 5, 'If a victim was sexually abused by more than one participant, an upward departure may be warranted, *see* §5K2.8 (Extreme Conduct),'" gave the defendant the requisite notice. Further, the defendant argued the record did not support the court's finding of extreme conduct because the victims stated they only pretended to have sex with each other. However, the district court did not err in finding that being put in the position where they had to pretend to have sex was degrading enough to warrant a finding of extreme conduct.

United States v. Paster, 173 F.3d 206 (3d Cir. 1999). The district court did not err in imposing a nine-level upward departure based on "extreme conduct" under §5K2.8. The defendant argued that pursuant to United States v. Kikumura, 918 F.3d 1084 (3d Cir. 1990), the district court erred in not applying a clear and convincing standard of proof to justify the departure. The district court cited the facts of this case (the defendant stabbed his wife16 times with a butcher knife) and concluded that the defendant's conduct was unusually heinous, cruel and brutal. Although the court did not expressly recite the clear and convincing standard, the "[i]ncantation of the term 'clear and convincing' was not necessary on this record." The defendant also argued that the guideline for second degree murder takes into account the heinous nature of his conduct. A departure under §5K2.8 is an "encouraged" departure, and the district court did not abuse its discretion in finding that the defendant's conduct was more heinous than conduct "that constitutes the so-called 'heartland' of second degree murders." Here the court made explicit findings that were even supported by the testimony of a pathologist who stated that "it was one of the most severely violent deaths he had ever documented." Although the Third Circuit upheld the basis for the departure, it

remanded the case for resentencing because the 365-month sentence imposed for the defendant's conviction for second degree murder was equal to a heavy sentence that could be imposed for a first degree murder conviction. The district court found no acceptable analogous guideline for the extent of the departure. Instead, the court cited four cases involving upward departures without comparing the conduct and grounds for departure in those cases with the instant case. If the defendant had pled guilty to first degree murder and received a two-level reduction for acceptance of responsibility, he would have faced a guideline range of 324-405 months—the median of which is the sentence he actually received. "The lack of disparity between Paster's actual sentence and one he could have received had he pleaded guilty to, or been convicted of, a more serious crime distorts proportionality, a critical objective of the sentencing guidelines.

§5K2.10 Victim's Conduct (Policy Statement)

United States v. Paster, 173 F.3d 206 (3d Cir. 1999). The district court did not err in refusing to grant a downward departure under §5K2.10, which authorizes a departure "if the victim's wrongful conduct contributed significantly to provoking the offense behavior." The defendant argued that his "wife's revelation of past infidelity exposed wrongful conduct and was the sole provocation for the fatal stabbing." (The wife/victim had told the defendant that she had between 40 and 50 affairs and shortly thereafter, the defendant stabbed her sixteen times.) The district court found that the conduct of the victim did not warrant a departure. Generally, only a victim's violent, wrongful conduct warrants a downward departure. Here there was no danger or perception of danger to the defendant. Even if a victim's "infidelities" could constitute "wrongful conduct" to justify mitigation, the defendant's response in this case was grossly disproportionate to any provocation by the victim.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.4 Term of Imprisonment (Policy Statement)

United States v. Brady, 88 F.3d 225 (3d Cir. 1996), *cert. denied*, 519 U.S. 1094 (1997). The district court did not err in revoking the defendant's supervised release and sentencing him to 12 months imprisonment to be followed by a three-year supervised release term. The defendant was indicted for knowingly, intentionally, and unlawfully possessing cocaine with intent to distribute and he argued that the district court applied 18 U.S.C. §§ 3551-86, which was not in effect when he was originally sentenced. He claimed that this additional punishment for his crime could not have been imposed when he committed that crime, and therefore violated the ex post facto clause of the Constitution. However, the circuit court rejected the defendant's contention on the grounds that he was not prejudiced by the enactment because the amended subsection (h) did not change the amount of time his liberty would have been restrained. Therefore, the circuit court did not find an ex post facto violation and affirmed the decision of the lower court.

CONSTITUTIONAL CHALLENGES

Fifth Amendment–Double Jeopardy

United States v. Baird, 63 F.3d 1213 (3d Cir. 1995), *cert. denied*, 516 U.S. 1111 (1996). The district court did not err in denying the defendant's motion to dismiss an indictment on double jeopardy grounds when the indictment followed an administrative forfeiture hearing. The circuit court identified the differences between administrative and civil forfeitures for double jeopardy purposes, noting that administrative forfeitures are allowed only when the value of the property seized is less than a jurisdictional amount and no claim is filed within 20 days of the first publication of a notice of seizure. The circuit court recognized that two recent rulings by the Supreme Court indicate that civil forfeitures may constitute punishment for Eighth Amendment purposes. *See* United States v. Halper, 490 U.S. 435 (1989); Austin v. United States, 509 U.S. 602 (1993). The circuit court ruled that an administrative forfeiture of unclaimed alleged drug proceeds did not constitute "punishment," especially since an administrative forfeiture cannot, by definition, "entail a determination of ownership of the property to be forfeited."

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 851

United States v. Kole, 164 F.3d 164 (3d Cir. 1998). The district court did not err in imposing an enhanced sentence under 21 U.S.C. § 851 based on the defendant's prior felony drug conviction in the Phillippines. The defendant argued that the Phillippines conviction was obtained in violation of the United States Constitution because she was denied effective assistance of counsel and was not entitled to a jury trial. The Third Circuit found that the conviction was not obtained in a manner inconsistent with due process, even though the defendant was not entitled to a jury trial.

18 U.S.C. § 2259

United States v. Crandon, 173 F.3d 122 (3d Cir. 1999). The district court did not err in requiring the defendant to pay restitution of $57,050.96 to cover the victim's in-patient hospital treatment for "suicidal ideation." Congress intended that full restitution to minor victims is warranted when a defendant is convicted of federal child sexual exploitation and abuse offenses. After considering opinions from a licensed social worker and a psychiatrist, the district court found that the defendant's conduct was the proximate cause of the victim's worsening depression that led to the hospitalization. In addition, the victim had never been treated before the incident. Even if the victim had a preexisting mental condition, it was not unreasonable for the district court to conclude that the defendant's actions were a substantial factor in causing additional strain and trauma. The district court did not err in ordering full restitution rather than order nominal periodic payments. The defendant's higher education suggested that his potential earning capacity precluded a finding of indigency.

18 U.S.C. § 3583

United States v. Brady, 88 F.3d 225 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 773 (1997), the court reasoned that, under the prior law as interpreted by the circuit, a defendant whose original offense was a Class A felony who then violated supervised release could be sentenced to imprisonment under 18 U.S.C. § 3583(e)(3) for up to the maximum term of supervised release for a given offense, without any credit for the time spent on supervised release. Under the new subsection (h), the district court may impose a new term of consecutive supervised release, but the term may not exceed the maximum term of supervised release authorized for the offense, minus the term of imprisonment imposed upon revocation of the original term of supervised release. The legal consequence, loss of freedom, is the same; the availability of supervised release in no way increased the amount of time he was exposed to incarceration; thus subsection (h) did not increase the penalty for his original offense and there was no *ex post facto* violation.

United States v. Crandon, 173 F.3d 122 (3d Cir. 1999). The district court did not err in imposing as a condition of supervised release a requirement that the defendant not "possess, procure, purchase or otherwise obtain access to any form of computer network, bulletin board, Internet, or exchange format involving computers unless specifically approved by the United States Probation Office." The defendant pled guilty to one count of receiving child pornography for possessing a photograph of a 14-year-old girl with whom he had sexual relations after communicating with her through electronic mail for several months. The defendant argued that the special condition restricting his computer access would limit his employment opportunities and freedoms of speech and association. The Third Circuit found that in light of the defendant's prior conduct, the special condition involving restrictions on constitutional rights was valid because it was narrowly tailored and "directly related to deterring Crandon and protecting the public."

United States v. Dozier, 119 F.3d 239 (3d Cir. 1997). The court held that there was an *ex post facto* violation for those defendants who committed a Class B, C, or D felony prior to the enactment of 18 U.S.C. § 3583(h). Under the old law, the greatest sentence of imprisonment the defendant could receive was 24 months; under the new law, he could be sentenced to imprisonment of up to 24 months, plus supervised release of up to an additional 12 months, for a total possible punishment of 36 months. Thus, the enactment of 18 U.S.C. § 3583(h) had the effect of increasing the penalty for this defendant and for others similarly situated.

United States v. Evans, 155 F.3d 245 (3d Cir. 1998). The district court erred in conditioning supervised release on reimbursement of the cost of court-appointed counsel. The court of appeals first noted that an order may be a condition of supervised release only to the extent that it: (1) is reasonably related to the factors set forth in the general sentencing statute, 18 U.S.C. § 3553(a); (2) involves no greater deprivation of liberty than reasonably necessary for the purposes set forth in 18 U.S.C. § 3553(a); and (3) is consistent with pertinent policy statements issued by the Sentencing Commission. Although the Criminal Justice Act, 18 U.S.C. § 3006A, permits a court to order reimbursement of fees for appointed counsel when it finds funds are available, such an order does not satisfy the requirements of the supervised release statute. The court held that the condition is not reasonably related to the defendant's offense, nor would it likely serve the statutory purposes of deterring crime, protecting the public, or serving any rehabilitative function. Thus, the district court improperly made the reimbursement order a condition of supervised release.